

**Crown Cork & Seal Company, Inc. and United Steelworkers of America, AFL-CIO-CLC.**  
Cases 4-CA-18732, 4-CA-18892, and 4-RC-17299

August 31, 1992

**DECISION AND ORDER**

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On September 23, 1991, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and both the Respondent and the General Counsel filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified,<sup>2</sup> and to adopt the recommended Order as modified.

The judge found, inter alia, that, as of February 22, 1990, the Union had valid authorization cards signed by 18 of the 31 employees in the unit. He also found that the Respondent embarked on its course of unfair labor practices on that date, and that the nature and pervasiveness of the Respondent's unfair labor practices at its Vineland, New Jersey plant render a fair rerun election unlikely and that a bargaining order is warranted under these circumstances. We agree.<sup>3</sup>

We disagree, however, with the judge's issuance of a bargaining order that is retroactive to the date of the

election, May 3, 1990, rather than to February 22, 1990, when the Respondent commenced its unlawful conduct. As the judge recognized, in *Trading Port*,<sup>4</sup> in which the Board first issued a retroactive remedial bargaining order, the employer's bargaining obligation attached on the date the union demanded recognition and bargaining, not the earlier date when the employer had embarked on its course of unlawful conduct. The judge further correctly observed that here, according to a clause in the master agreement between the Union and the Respondent covering production and maintenance employees at 12 other of the Respondent's plants, the Respondent was required to apply the contract to any newly recognized or certified unit, including the Vineland plant unit. In the absence of a demand for recognition and bargaining and because of operation of this "automatic recognition" clause, the judge recommended against dating the Employer's bargaining obligation from February 22. Retroactive application, he concluded, would result in a "windfall" to the Union in obtaining substantial contract benefits. The judge found that May 3, when the election was held, was the more appropriate date for fixing the Respondent's bargaining obligation. The judge reasoned that the May 3 date would avoid the "windfall," would comport with the expectations of the parties, and would avoid the appearance of having punitive elements in the remedy. We reverse.

In *Peaker Run Coal Co.*, 228 NLRB 93 (1977), the Board rejected the argument that a retroactive bargaining order is inappropriate in the absence of a demand for recognition and bargaining. That is, such a bargaining order can be an appropriate remedy for unfair labor practices even in the absence of an 8(a)(5) violation for failing to recognize a majority representative on demand. Further, the Board said that the bargaining order would attach on the date when the union had achieved majority status and the employer had begun its unlawful campaign. In that way, any subsequent change, not otherwise unlawful and remediable, would be subject to the bargaining obligation. The Board distinguished *Trading Port*, a case where the bargaining order was dated as of the Union's demand for recognition rather than the earlier date of *Trading Port*'s unfair labor practices. In that case, all conduct prior to the demand for recognition had been individually remedied by the Board's order and thus there was no need to subject such conduct to the bargaining obligation.

In the instant case, the Union had achieved majority status, and the Respondent began its unlawful campaign on February 22. Further, the contract between the parties (covering other locations) provides that if the Union becomes the representative at a new location the contract benefits will apply at that location. Thus,

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We modify the judge's recommended conclusions of law to conform to his findings.

<sup>3</sup>The judge found that, in the course of the union campaign, the Respondent repeatedly threatened its employees with layoffs and job loss if the Respondent's end press and can handling equipment were not installed at the Vineland plant. The Respondent based its "predictions" on Vineland's alleged lack of competitiveness, vis-a-vis its sister plants, if the Union won the election. In adopting the judge's findings in this regard, we emphasize the Respondent's failure to substantiate its claims with any objective supporting evidence, such as wage scales, benefits, and total costs and efficiency of the plants where the Steelworkers' contract was not in effect. This anticompetitiveness theme in its campaign literature and speeches thus was not "carefully phrased on the basis of objective fact to convey [the Respondent's] belief as to demonstrably probable consequences beyond [no] control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). "It is," as stated succinctly by the judge, "merely the Respondent's *ipsi dixit*."

<sup>4</sup>219 NLRB 298 (1975).

there is a remedial purpose to be served by dating the bargaining obligation from February 22.

Contrary to the judge, neither the expectations of the parties nor the avoidance of a punitive remedial order warrants a departure from the well-established rule of *Peaker Run* which requires that the bargaining order be retroactive to the Respondent's February 22 unfair labor practices. Compliance shall offset differences in wage and benefit relief provided under the master agreement against noncontractual wages and benefits that the Respondent has paid since its bargaining obligation attached. The judge's concern that an unwarranted "windfall" of benefits will be bestowed on the Union is therefore unfounded.

Further, the date of the election is an arbitrary event by which to fix the Respondent's bargaining violation: not even the filing of a representation petition—much less the parties' proceeding to a Board election—is a necessary predicate to the grant of a retroactive *Gissel* bargaining order.<sup>5</sup> Accordingly, we shall order the Respondent to bargain with the Union as of February 22, 1990, the date on which the Respondent's unfair labor practices began, by which date the Union had also achieved majority status.

#### AMENDED CONCLUSIONS OF LAW

Insert the following as paragraphs 7 and 8 and re-number subsequent paragraphs.

"7. About April 25, 1990, the Respondent, by James Toomey, its supervisor and agent, violated Section 8(a)(1) of the Act by threatening job loss by unit employees if they selected the Union as their collective-bargaining representative in the Board-conducted election on May 3, 1990."

"8. About May 1, 1990, the Respondent, by John Bugnitz, its supervisor and agent, violated Section 8(a)(1) of the Act by coercively interrogating an employee regarding his union activities."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Crown Cork & Seal Company, Inc., Vineland, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Make whole Vineland unit employees for the period commencing February 22, 1990, for any loss of earnings and benefits they may have sustained by virtue of the Respondent's failure to apply the terms of the master agreement to them, and make whole the

Union for any master agreement contributions the Respondent failed to make to it commencing February 22, 1990."

2. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees, threaten them with loss of benefits or plant shutdown or layoffs, or tell them that if the Union gets in they, or any of them, would be responsible for loss of jobs because of their support for or membership in the United Steelworkers of America, AFL-CIO-CLC, the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL recognize and, on request, bargain collectively with the Union, as the exclusive representative of the employees in the following unit, by applying the terms of the master agreement, and any applicable amendment or successor thereof, to the Vineland unit employees and the Union, retroactive to February 22, 1990, and thereafter continue to recognize and bargain with the Union with respect to rates of pay, hours, and other terms and conditions of employment in the following unit:

All full-time and regular part-time production and maintenance employees, employed by the Respondent at its 502 West Elmer Road, Vineland, New Jersey facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL make whole Vineland unit employees for the period commencing February 22, 1990, for any loss of earnings and benefits they may have sustained by virtue of our failure to apply the terms of the master agreement to them, and make whole the Union for

<sup>5</sup> See, e.g., *Bighorn Beverage*, 236 NLRB 736 (1978), enf'd. 614 F.2d 1238 (9th Cir. 1980).

any master agreement contributions we failed to make commencing February 22, 1990.

CROWN CORK & SEAL COMPANY, INC.

*Timothy J. Brown, Esq.*, for the General Counsel.

*Howard L. Bernstein, Esq. (Katten, Muchin & Zavis)*, of Chicago, Illinois, for the Respondent.

*Carol Burkett, Esq.*, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter<sup>1</sup> was heard between April 3 and 5, 1991, in Philadelphia, Pennsylvania, on the issues raised by the General Counsel's February 14, 1991 amended consolidated complaint and notice of hearing (as further amended at the hearing) and the Regional Director's (Region 4) Report on Objections to Election, dated July 26, 1990, and Respondent's timely answers thereto.<sup>2</sup> The allegations of the complaint and the Report on Objections, in substance, allege acts of Respondent in violation of Section 8(a)(1) of the Act and its engaging in conduct, legally objectionable, to set aside the Board-conducted election in the above-captioned representation case. The complaint allegations of violation of Section 8(a)(1) of the Act parallel, in part, the conduct found objectionable by the Regional Director in his Report on Objections. The complaint, as further amended at the hearing, alleges that Respondent, through its various supervisors and agents, unlawfully interrogated employees, threatened to discontinue an employee thrift plan, and threatened employees with layoff if they selected the Union as their bargaining representative, all in violation of Section 8(a)(1) of the Act. The complaint specifically requests the issuance of a bargaining order in lieu of other traditional Board remedies in order to remedy the unfair labor practices.

The Regional Director's Report on Objections to the Election, issued July 26, 1990, observes that the Union's objections relate to only three matters: alleged unlawful interrogation and threats of layoffs by Respondent's plant manager,

John Bugnitz, and Respondent's threats to take away benefits if the Union won the election.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and argue on the record. At the close of the hearing, counsel and the parties waived final argument and reserved the right to submit posthearing briefs. Posthearing briefs were presented by all parties and have been duly considered in the light of the record as a whole.

On the entire record, including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent concedes, and I find, that at all material times, it has been and is a Pennsylvania corporation engaged in the manufacture of food containers at its plant located in Vineland, New Jersey, where, in the year prior to the issuance of the complaint, in the course and conduct of its business operations at the Vineland plant, Respondent purchased and received goods valued in excess of \$50,000 directly from points outside the State of New Jersey. Consistent with Respondent's further concession, I find that Respondent, at all material times, has been and is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

I find, as Respondent admits, that at all material times United Steelworkers of America, AFL-CIO-CLC (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures food packaging devices, including metal food and beverage cans, in a number of plants throughout the nation, including the Vineland, New Jersey plant which is the subject of this case. As Respondent observes (R. Br. 8), at the time of the May 3, 1990 election which is the subject of objections in Case 4-RC-17299, consolidated here, Respondent operated 32 such plants throughout the country employing approximately 3200 employees. Of these 32 plants, apparently 30 were organized by labor unions, 12 of which were organized by the Union here, the United Steelworkers. The production and maintenance employees in these 12 plants were subject to a master agree-

<sup>1</sup> The name of Respondent was corrected at the hearing. Respondent, in a stock purchase of July 15, 1990, acquired the Food Packaging Division of Continental Can Company. The alleged unfair labor practices appearing here as well as the Board-conducted election, together with the supporting papers, all are in the name of Respondent's predecessor, Continental Can Company, Inc., Continental Food Packaging Division. Respondent concedes, however, that it has continued as the employing entity and that it is the successor of the Continental Can Company (Tr. 28). At the hearing, Respondent also admitted that it was on notice of Continental Can's obligation to remedy the alleged unfair labor practices (Tr. 28; G.C. Exhs. 1(u) and (b)). The General Counsel argues, and I agree, that Respondent is liable for remedying the unfair labor practices in the instant case, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

<sup>2</sup> The underlying unfair labor practice charge, filed by United Steel Workers of America, AFL-CIO-CLC (the Union) in Case 4-CA-18732 on March 15, 1990, was served on March 19, 1990. The charge in Case 4-CA-18892 was filed on May 8, 1990, and served on Respondent on May 10, 1990.

<sup>3</sup> Respondent also admitted, in its answer and at the hearing, that its plant manager, John Bugnitz, and its corporate manager of employee relations, Lynne Krueser (through August 3, 1990), have been, at all material times, its supervisors within the meaning of Sec. 2(11) of the Act. Bugnitz is the chief supervisor in the plant over 31 employees. Krueser, as will be seen, spoke for, and with the approbation of, Bugnitz to the plant employees. Contrary to Respondent's denial, I conclude that both were Respondent's *agents*, acting with apparent authority in their statements and actions toward Vineland employees, within Sec. 2(13) of the Act. *House Calls, Inc.*, 304 NLRB 311 (1991), and cases cited.

ment between the Steelworkers Union and Respondent. The master agreement (G.C. Exh. 3(a)), in existence in some form for approximately 40 years, now extended for the 3-year period ending February 21, 1993, provides for a single, multiplant bargaining unit with uniform terms and conditions of employment. The only unorganized plants were in Houston and the Vineland plant.

The parties agree that the master agreement automatically applies to any unit of Respondent's metal can manufacturing employees, as here, where the Union is either certified in that unit or Respondent grants recognition therein (G.C. Exh. 6, art. 2.1).

The Vineland plant, at all material times, had a stable work force of 31 employees working three shifts. Respondent's answer admits that the following unit of Vineland employees constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, employed by the Respondent at its 502 West Elmer Road, Vineland, New Jersey facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

#### B. Union Organization and Respondent's Reaction

Some time in January 1990, the Union began organizing the Vineland production and maintenance employees and obtained signed authorization cards from 18 of the 31 employees in the unit.<sup>4</sup>

On March 1, 1990, the Union filed a petition for certification in the above-captioned representation case. Thereafter, based on the parties' March 30, 1990 Stipulated Election Agreement, an election by secret ballot was conducted on May 3, 1990, in the above unit. Of 31 eligible voters, 16 employees voted against the Union and 13 voted for the Union. On May 8, 1990, the Union filed timely objections to conduct affecting the results of the election. Meanwhile, as early as March 15, 1990, the Union filed the original unfair labor practice charge relating to Respondent's conduct in or about February 22, 1990, before the filing and service of the petition for certification.<sup>5</sup> Thereafter, along with the objections

<sup>4</sup> All the signed authorization cards, in evidence, are "single purpose" cards: "I hereby authorize the United Steelworkers of America, AFL-CIO-CLC to represent me in collective bargaining." Such "single purpose" cards may be used as a basis for determining majority sentiment among unit employees as a predicate for the issuance of a bargaining order as a remedy for an employer's unfair labor practices. The cards, the Supreme Court held, became a more reliable indicator of employee desires than the results of a Board-conducted election, set aside because of an employer's unfair labor practices. Under certain circumstances, the employer's unfair labor practices render unsatisfactory the preferred resolution of the question concerning representation, i.e., an election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606-608 (1969). The Supreme Court, in *Gissel*, adopted the Board's *Cumberland* rule (*Cumberland Shoe Corp.*, 144 NLRB 1268 (1963)) relating to the efficacy of single purpose cards as a predicate for determining employee majority sentiment for the purpose of issuing a bargaining order. See *Somerset Welding & Steel*, 304 NLRB 32 (1991).

<sup>5</sup> In order to set aside an election based on an employer misconduct, the misconduct must occur in the "critical period," i.e., between the March 1, 1990 filing of the election petition and the date

to the election, an additional charge was filed on May 8, 1990, in Case 4-CA-18892. It is the allegations in the complaint based on this latter charge, which substantially track the Union's objections to the election, on which the consolidation of cases was ordered.

On or about February 20, 1990, a letter was sent to each unit Vineland employee on the letterhead of the United Steelworkers of America, AFL-CIO, District Nine, by "the committee for union representation," inviting each of the unit employees to a meeting at a nearby motel on Sunday, February 25, 1990.

As Plant Manager Bugnitz was coming to work on Thursday morning, February 22, 1990, employee Sal Calabrese gave him a copy of the committee's letter. By 11 a.m. of that morning, after employee Carl Merkt<sup>6</sup> had entered the outer office area and discussed a production problem with his supervisor (Dominick Ciuffetelli), the supervisor told him that Bugnitz wanted to see him in the inner office. There, Bugnitz asked him if he knew anything about the Union's letter. Merkt answered that he did. Bugnitz then asked Merkt if he knew what the letter contained and Merkt answered that he did and that he had written the letter (Tr. 132). When Bugnitz asked Merkt: "Why didn't you come to me first?" Merkt told him that he felt that "we had exhausted all of our opportunities to discuss the problems that we had and I felt that . . . we needed some outside help" (Tr. 132-133). Bugnitz, appearing upset to Merkt, then said: "This letter is signed, The Committee for Union Representation." When Merkt answered, "yes," Bugnitz asked: "who's on the committee?" Merkt answered: "I will not tell you that." Merkt responded: "It's not important" (Tr. 133). Bugnitz asked again: "Why didn't you come to me first, I thought we had a better relationship than that." Merkt said that it was not a "personal thing" between them; rather, it was "an economic situation and that numbers of us had discussed this situation at the plant over a period of time, and we came to the conclusion that we needed to seek outside representation."

Bugnitz answered: "This is a direct reflection on my managerial ability" (Tr. 133). Merkt repeated that there was nothing personal and purely "an economic situation" (Tr. 133). Merkt then listed the reasons he wanted union representation: wages, benefits, and pension. Merkt said that he was one of the original employees to form the committee to seek union representation. Merkt recalled that Bugnitz repeated his being "upset" with the employees' failing to come to him concerning their problems. The Merkt-Bugnitz meeting in Bugnitz' office lasted for about 30 minutes, from about 11 to 11:30 a.m. (Tr. 134).

of the Board-conducted election (May 3, 1990). See *Ideal Electric Co.*, 134 NLRB 1275 (1961).

<sup>6</sup> Merkt is the most senior employee. He was elected by the unit employees as the "plant representative," a spokesman for other employees, who discussed with management employee problems of lateness or absenteeism. He did not discuss topics such as job security or work assignments. Bugnitz also named him as one of three employees as a "steering committee" which discussed work-related problems with management (Tr. 771).

Paragraph 5(a) of the amended complaint alleges that Bugnitz coercively interrogated Merkt in the morning of February 22 in violation of Section 8(a)(1) of the Act. Paragraph 5(b) of the complaint alleges another Bugnitz' coercive interrogation on or about February 22, 1990. Although Bugnitz denied the testimony of night-shift employee Gary Miller, I find that about 10:45 p.m., before the start of the night shift, several hours after Bugnitz had interrogated Merkt, Bugnitz followed Miller into the bathroom. Bugnitz did not use the facilities. Bugnitz asked him if he had received the letter from the Union. When Miller said that he had, Bugnitz asked him what he "thought of the union coming in." Miller said he wasn't sure.

I credit Miller because I observed Bugnitz to be an emotional, talkative individual, obviously concerned about this action of his employees which he believed reflected on his managerial function and upset him. In addition, later Miller's testimony of further Bugnitz' interrogation, largely admitted by Bugnitz, supports this earlier Miller recollection. Miller later told Bugnitz that he felt harassed by Bugnitz and other inquiries into his position concerning the Union.

Further alleged acts of coercive interrogation, according to paragraphs 5(g) and (h) of the complaint, occurred in late April 1990. Bugnitz here admits to having had two, one-on-one conversations in the storeroom with Gary Miller (Tr.749). These conversations, according to Bugnitz, were initiated by Bugnitz and took place about a week before the May 3, 1990 election (Tr. 750). Bugnitz testified that he told Miller that if he had "any questions or concerns that he needed answers to regarding the organizing drive, 'he should see either [Supervisor] Dominick Ciuffetelli or John Julian, and specifically John Julian, because [Miller] had worked with John Julian for a long period of time, and John Julian had done him some favors, and he could trust John Julian'" (Tr. 750). Miller told Bugnitz that he would talk to Julian. Miller does not dispute Bugnitz' testimony except that Miller amplified Bugnitz' description of Supervisor Julian as Miller's "good friend." He testified that Bugnitz reminded him that Julian had helped Miller in August 1989 by going down to Maryland to pick up Miller and his wife because Miller's car had broken down. Bugnitz told Miller that "not too many friends would do that" (Tr. 305).

Miller testified that a couple of days later, a few days before the election (Tr. 306; 750), Bugnitz again spoke to Miller in an office near the main plant entrance. Bugnitz asked Miller if he had talked with Julian. According to Bugnitz, Miller answered by saying only that "he wanted to be left alone" and that Miller and Bugnitz then merely walked away from each other (Tr. 751).

Miller's version (Tr. 307), denied in part by Bugnitz (Tr. 751), was that he told Bugnitz not only that he wanted to be "left alone" but that he was "tired of being harassed, not being questioned every time about what I'm going to do about the Union" (Tr. 307). Miller also told him that he had removed his union button because he had had his "fill of everything." And that he "just didn't want to be bothered" (Tr. 307).

### C. Discussion and Conclusions; Interrogation

#### 1. Bugnitz coercively interrogates Merkt on February 22, 1990<sup>7</sup>

The parties appear in agreement that the Board's test for the lawfulness of interrogation is that it must be "coercive" considering all the circumstances of the conversation. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985): whether the interrogation reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act, including the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Whether the employee was an open and active union supporter is also a relevant factor. *Kellwood Co.*, 299 NLRB 1026 (1990).

In assessing the coercive nature of Bugnitz' February 22 interrogation of Merkt, it must be recalled that Bugnitz, the highest plant supervisor, called Merkt into his private office, the plant locus of authority. It was a one-on-one interrogation, initiated by the supervisor, of an employee not known as an open and active union supporter. *Kellwood Co.*, supra. Regardless of the tendency to coerce Merkt by the question of whether he knew anything about the letter and what the letter contained, when Merkt told Bugnitz that Merkt, himself had written a letter, there is no question that Bugnitz learned by this very interrogation that Merkt was a prominent union advocate because he revealed that he was the author of the letter. This is far different from resolving the question of "coerciveness" where an employee's own prior activities in support of the union have been open and notorious. Compare *Sunnyvale Medical Center*, 277 NLRB 1217 (1985), with *Springs Motel.*, 280 NLRB 284 fn. 2 (1986). Especially where, as here, Bugnitz, the highest plant official, advises the employees how personally and professionally upset he is with Merkt's conduct in not coming to him first, the interrogation must be considered hostile because Merkt is contemporaneously advised that Bugnitz regards Merkt's action as having an adverse effect on Bugnitz' "managerial ability."

Bugnitz then asked Merkt, who was on the "committee for union presentation" (Tr. 133). Merkt answered: "I won't tell you that" (Tr. 133). It was only then that Bugnitz told him that it was not important. When Bugnitz again asked Merkt why the employees had not come to him first, and stated that he thought that he had had a better relationship with the employees than to have them go to the Union, Merkt told Bugnitz that it was not a "personal thing" but more an "economic situation" (Tr. 133).

Bugnitz' question concerning *who* was on the committee was clearly unlawful and coercive. It went well beyond the question of Merkt's own union activities and was an attempt to seek out information concerning how widespread union support was. It is a question designed to have Merkt divulge the extent of organization of the employees, particularly the effectiveness of the Union's organizational campaign. The Act is designed so that employees are permitted to keep such information to themselves, *NLRB v. Laredo Cocoa Cola Bot-*

<sup>7</sup>Because this conversation occurred prior to the filing of the March 1, 1990 petition, it is outside the "critical period" and may not therefore support a lawful objection for the purpose of getting aside the election. *Ideal Electric Co.*, 134 NLRB 1275, 1278 (1961).

*ting Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980).

After Merkt refused to divulge the names of members of the union committee, it was only then that Bugnitz told him that it was "not important." This is not the equivalent of Bugnitz repudiating his question. *Passavant Memorial Hospital*, 237 NLRB 138 (1978); it was merely an attempted assurance that Bugnitz would not insist on probing further into that area.

In short, a hostile interrogation of an employee, not previously known to be a union supporter, concerning not only his own union activities but the activities of other employees is "coerced" within the meaning of Section 8(a)(1) of the Act. Furthermore, in view of Bugnitz' admitted continuing and increasing personal upset at the actions of the employees in going to the Union (Tr. 132 et. seq.), his admitted disappointment in believing that he had a better relationship with the employees (Tr. 133), and particularly his statement to Merkt that the action of employees in going to the Union was "a direct reflection upon my managerial ability" (Tr. 133), I do not credit Bugnitz' statement, nor did Merkt believe, the names of the other employees on the committee for union representation were "not important" to Bugnitz (Tr. 133). It was those employees whose leadership action was "a direct reflection upon my managerial ability" (Tr. 133).

Respondent defends on various grounds. To the extent that Respondent analogizes the Bugnitz-Merk conversation to that in *Sunnyvale Medical Center*, supra, as "friendly" and "casual," that analogy does not fit. This conversation, with the recriminatory tone because the employees did not first come to Bugnitz, having disappointed Bugnitz because he thought there was a better relationship between him and the employees, and his regarding the employees' action as an attack on his managerial ability, together with his desire to know the composition of the leadership group, does not make this "friendly" or "casual" interrogation. Furthermore, in *Sunnyvale Medical Center*, supra, the employee voluntarily walked into the personnel director's office. In the instant case, Bugnitz summoned Merkt into his office to inquire about the union letter. Thus, under the "totality of circumstances" test in *Sunnyvale* and *Rossmore House*, supra, the relevant factors demonstrate an unlawful, coercive interrogation.

To the extent Respondent defends (Br. 79) on the ground that Bugnitz and Merkt enjoyed a unique relationship which militated against a coercive atmosphere, Respondent cites *Morgan Services*, 284 NLRB 862 (1987). In that case, Respondent observes that the Board distinguished otherwise unlawful interrogations from a lawful interview in the production manager's office of the shop steward (Rice). Respondent notes that the Board stressed that the shop steward had visited the manager's office in the past in her capacity as shop steward and therefore the interview with him concerning the Union was not "an unusual event creating an atmosphere of unnatural formality," a basis on which the Board found interrogation of other employees to be unlawful. *Morgan Services*, supra at 863. Yet *Morgan Services*, supra, is readily distinguishable on its facts. In the instant case, Bugnitz learned of Merkt's particular support of the Union only through unlawful interrogation whereas in *Morgan Services*, the shop steward admitted to management her open adherence to the Union. Whereas in *Morgan Services*, the production manager

assured the shop steward that there would be "no major changes if the union was voted out [in a decertification proceeding]," in the instant case, Bugnitz' tone concerning the employees' union activities was hostile. Lastly, the shop steward in *Morgan Services* was regularly in the production manager's office to discuss union business.

In the instant case, although Merkt may have often been in Bugnitz' office to discuss employee problems, Merkt's and other employees' union activities were never discussed. Under Section 7 of the Act, an employee's own union activities, and, a fortiori, his knowledge of the activities of his co-employees, may be kept from the employer. Bugnitz' questions, addressed to an employee with unknown union sympathies summoned to his private office, were delivered in a hostile atmosphere without any assurance against retaliation, necessarily violate Section 8(a)(1) as alleged. *NLRB v. Laredo Cocoa-Cola Bottling Co.*, 613 F.2d 1338 (1980), cert. denied 105 LRRM 2658 (1980). Whatever else Bugnitz' interrogation of Merkt constituted, it was not merely "a question of concerned interest," *Specialty Steel Treating*, 279 NLRB 670, 672 (1986), nor was it merely Bugnitz' "harmless curiosity" concerning the union activities of Bugnitz' coemployees on the committee for union representation. *Springs Motel*, 280 NLRB 284 fn. 2 (1986). Even if Bugnitz' interrogation was "friendly" and low-keyed, instead of hostile and personal, it was designed to discover both the extent of union organization and Merkt's sympathies and was unlawful. *Quemetco, Inc.*, 223 NLRB 470 (1976).

Merkt's status as the most senior employee, the elected "plant representative", and member of the employee steering committee of employees (which did not discuss topics such as job security and work assignments) are irrelevant to the issue of coercive inquiry into union activities. Under Section 7 of the Act, Merkt had the right to keep his own and the committee's union activities, as opposed to work-related problems, confidential. Employer knowledge of employee union sympathy, gained by hostile inquiry, tends to prevent its free exercise. *Quemetco, Inc.*, supra.

Lastly, to the extent Respondent relies on language in *Pony Express Courier Corp.*, 283 NLRB 868 (1987), that a supervisor's single question to the employee concerning whether she had been approached regarding the union "made it unlikely that [the employee] would have left the conversation feeling coerced" (*Pony Express Courier Corp.*, supra, 283 NLRB at 868), such reliance is unavailing in the context, here, of a hostile inquiry. I regard the quoted statement, in any event, focusing on whether the employee felt coerced, to be an incorrect statement of the law. For the Board has specifically held, *El Rancho Market*, 235 NLRB 468, 471 fn. 11 (1978):

[It] is clear that the lawfulness of an employer's conduct does not turn on whether or not a particular employee feels that the conduct complained of has interfered with, restrained or coerced him in the exercise of its Section 7 rights.

Rather, the Board held, that the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of an employee's rights under the Act, *El Rancho Market*, supra, 235 NLRB at 471. Thus to the extent Re-

spondent appears to defend on Merkt's personal feelings of coercion because of the interrogation, such a defense is unsupported by Board and court rulings. See *PRC Recording Co.*, 280 NLRB 615 fn. 2 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987); citing *Operating Engineers Local 542 v. NLRB*, 322 F.2d 850, 852-853 (3d Cir. 1964), *cert. denied* 379 U.S. 826 (1964) (emphasizing that whether anyone was in fact coerced is irrelevant); *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1374 (7th Cir. 1982), cited on the point in *NLRB v. Overnite Transportation Co.*, 138 LRRM 2018 fn. 5 (7th Cir. 1991).

I therefore conclude that the February 22, 1990 Bugnitz interrogation of Merkt in Bugnitz' office was coercive within the meaning of Section 8(a)(1) of the Act, as alleged. In view of this finding and conclusion, I further conclude that it is unnecessary for me to reach or decide whether Bugnitz in or about February 20 to 22 *unlawfully and coercively* interrogated Garry Miller in Respondent's restroom (complaint par. 5(b)). Such a finding would be cumulative and would not affect the remedy for coercive interrogation in view of my finding with regard to the Merkt-Bugnitz conversation of on or about the same day. I do, however, find that Bugnitz did speak to Miller about the Union in the restroom at that time.

## 2. Bugnitz coercively interrogates Miller in early May before the election

On the other hand, I feel obliged to pass on a further allegation of unlawful and coercive interrogation (par. 5(g)) with regard to Bugnitz' alleged interrogation of Gary Miller a few days before the May 3, 1990 election. I do so because, unlike the Bugnitz' interrogation of Merkt in February, this allegation of interrogation was a basis for the Union's objection to the election and was one of the objections made subject to the instant hearing, Regional Director's Report on Objections (G.C. Exh. 1(j)).

A few days before the May 3 election, in the supply room, Bugnitz approached Miller and told him that he "ought to be thinking what [he is doing]" (Tr. 350); and that if he had any questions or concerns regarding the Union's organizing drive for which he needed answers, he should see Supervisor Dominick Ciuffetelli or John Julian. Bugnitz told Miller that Miller had worked with Julian for a long period of time, that Julian had done him favors, and that he could "trust" Julian (Tr. 750). In this 30-second conversation, Miller told Bugnitz that he would talk to Supervisor Julian. A few days later, in one of the side offices off the main entrance, Bugnitz again approached Miller and asked him if he had spoken with Julian (Tr. 751). Whereas Bugnitz testified that Miller never answered the question and "basically" said that he "wanted to be left alone" (Tr. 751), Miller testified that he told Bugnitz that he was "tired of being asked what I was going to do about the Union vote and wanted to be left alone" (Tr. 354). Miller further testified that although he told Bugnitz that he did not want to be harassed and had taken off his union button, Miller admitted that Bugnitz had not asked him about the Union in this conversation or how he was going to vote. Other people had asked him these things (Tr. 357).

Bugnitz, on these occasions, urged Miller to seek to counsel of a supervisor to answer any questions that Miller may have had regarding the Union. Although Bugnitz' first suggestion, a few days before the election, may have been law-

ful in order to persuade Miller to seek Supervisor Julian's presumably antiunion views, the issue is whether his desire to discover whether Miller actually spoke with Julian was coercive. That Bugnitz did not use the word "union" and solicit an answer to the question of how Miller was going to vote in the election is not dispositive of whether there was coercive interrogation. Rather, it is whether Bugnitz' repeated questioning of Miller to determine whether he had followed Bugnitz' suggestion and direction to seek from Supervisor Julian a presumably procompany and antiunion position violates Section 8(a)(1) as being coercive interrogation.

In *Springs Motel*, *supra*, the Board held that a supervisor's repeated questioning of an employee who attended an antiunion meeting ("how did it go") despite assurances that "everything would be all right" violated Section 8(a)(1) as coercive interrogation. Here, Miller was not a known union supporter. Bugnitz' later inquiry as to whether Miller had, indeed, spoken to Supervisor Julian (especially if Miller were to reveal that he had not done so) constituted an implicit invitation to disclose his attitude toward the Union, his union sympathies, and the effectiveness of Respondent's antiunion campaign which had been going on since at least February 22, 1990, culminating in the imminent May 3, 1990 election. Thus, it is not Miller's impatient and heated response to Bugnitz' question (whether he had spoken to Supervisor Julian) that is significant, including that he was tired of being harassed about the Union and had taken off his union button. Although Bugnitz had spoken to Miller about the Union on two prior occasions, Miller's emotional response on this occasion may have resulted from inquiries by other persons rather than Bugnitz. Rather it is Bugnitz' second and repeated question as to whether Miller, to satisfy any uncertainties, had spoken to Supervisor Julian that constitutes the coerciveness in the interrogation. As in *Springs Motel*, *supra*, where the Board held, despite the supervisor's assurance that "everything would be all right" and that an employee was "to feel free to speak," a supervisor's repeated question to employees as to "how did it go?" after a company-sponsored antiunion meeting, was coercive. Such repeated questioning of a person, not known to be a union supporter, constituted "repeated implicit invitations to disclose union sympathies, antiunion feelings and the effectiveness of the Respondent's anti-union campaign." As in *Springs Motel*, the supervisor's question "how did it go," referring to the employees' view on the Company's antiunion meeting, was not "harmless curiosity." Bugnitz wanted both to estimate the effectiveness of his suggestion to Miller and to know whether Miller, consistent with Bugnitz' suggestion and direction, had received the presumably antiunion message from the supervisor. These questions, as I have noted, constitute an implicit invitation to disclose how Respondent's antiunion campaign had affected Miller. Under such circumstances, the questions were unlawful and coercive within the meaning of *Springs Motel*, *supra*, and a violation of Section 8(a)(1) of the Act as alleged, and a fortiori, on such a basis, objectionable conduct which interfered with the results of the election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). It is just such a position that Miller was entitled to keep to himself. As the Board specified in *Quemetco, Inc.*, 223 NLRB 470:

A more serious error lies in the premise that a "friendly" interrogation does not interfere with an em-

ployee's Section 7 rights. An employee is entitled to keep from his employer his view concerning unions, so that the employee may exercise a full and free choice on the point, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation may be suave, courteous, and low-keyed instead of boistrous, rude, and profane does not alter the case. *It is the effort to ascertain the individual employee sympathies by the employer, which necessarily interfered or inhibits the expression by the individual of free choice guaranteed him by the Act.* [Emphasis added.]

3. Alleged Bugnitz threats in violation of Section 8(a)(1) of the Act

(a) *Threat to Merkt, May 2, 1990*

By virtue of the General Counsel's further amendment of the amended complaint, subparagraph 5(k), the General Counsel alleges that Bugnitz on or about May 2, 1990, told an employee (Carl Merkt) that if Respondent "goes union," the employee will be responsible for the loss of a lot of jobs. The parties agree that a short exchange occurred between Merkt and Bugnitz in the morning of May 2, the day before the election, at Merkt's work station in a noisy area (Tr. 147, 762). While other employees were apparently in the work area, there was no suggestion that any of them overheard the conversation.

Merkt testified that Bugnitz approached him while he was working and told him that: "If the Union gets in, you're going to be responsible for a lot of people losing their jobs" (Tr. 148-149). Merkt testified, and Bugnitz agreed, that he angrily yelled at Bugnitz: "That's not true" (Tr. 149-150).

Bugnitz testified that he told Merkt: "The difference between you and I is that I care about the junior people in the plant, and I don't think you do" (Tr. 763). Bugnitz testified that after Merkt's angry response ("that's not true") he and Merkt then walked away from each other. Bugnitz specifically denies Merkt's version of the conversation (Tr. 763).

On my observation of the witnesses as they testified, and as the testimony of the witnesses showed and, indeed, as Bugnitz admitted, Bugnitz becomes emotional with regard to discussions of the Union and the employees' participation in union activities. I observed Merkt to be a more placid personality. Although it is true that even Bugnitz' version of the conversation might evoke in Merkt an angry reaction, which admittedly occurred, I conclude that Merkt's version would inspire a more violent reaction than Bugnitz' version of the conversation.

On the other hand, Respondent correctly notes that Merkt's prior sworn statements to the NLRB do not mention this incident.<sup>8</sup>

Yet it is not unknown that remarks by witnesses are not included in Board affidavits where the purpose of the affidavit is directed at other subject matter, rather than the particular threat itself. Thus Merkt's testimony was not contradict-

ing his affidavits; the affidavits merely contained no reference to the alleged threat and may have been omitted by the taker.

On the whole, I was more impressed with Merkt's testimony, notwithstanding the omissions in the affidavits, rather than Bugnitz' testimony. As I have observed, Bugnitz, being the more emotional of the two, was more likely to have used the slightly more inflammatory language which Merkt described rather than Bugnitz' version. I credit Merkt over Bugnitz and find that Bugnitz told him that if the Union got in, he was going to be responsible for a lot of people losing their jobs (Tr. 148-149).

Respondent defends on two grounds: the first is that as a matter of credibility, Bugnitz should be credited over Merkt. I have concluded to the contrary and find that Merkt's version should be credited.

Second, Respondent appears to defend on the ground that even crediting Merkt's version, the statement that Merkt "would be responsible for a lot of people losing their jobs" cannot be construed as a threat of job loss *against Merkt* as alleged in the complaint (R. Br. 73). I agree, especially because Merkt is the most senior employee. To the extent, however, that Respondent urges that remark did not imply animus against the Union, Respondent is clearly in error. Furthermore, it is irrelevant that Bugnitz' statement would not instill fear in Merkt that he was going to be laid off. Rather, Bugnitz' utterance directly states or necessarily implies that because of Merkt's union activities, if the Union got in, other employees would be laid off. For Bugnitz, the plant manager, to suggest, and indeed unequivocally state that Merkt's statutorily protected union activities would cause the layoff of his coemployees necessarily is a statement of retaliation, not against Merkt, but against the employees because of Merkt's union activities. Nothing in Bugnitz' statement tied the consequence of layoff to anything other than union success in the upcoming election. That there may have been a background of objective economic argument in favor of keeping the Union out does not bear on this retaliatory statement that Bugnitz made to Merkt on the day before the election. That statement, neither on its face nor by implication, carries any baggage of economic argument along with it. It is a plain, old-fashioned statement of retaliation against employees because of Merkt's protected union activities. I conclude that Bugnitz' May 2, 1990 statement to Merkt on the production line was an unlawful threat of retaliation against employees because of Merkt's union activities, in violation of Section 8(a)(1) of the Act as alleged.

This May 2, 1990 incident, first offered as an amendment to the complaint at the opening of the hearing on April 3, 1991, of course, was not included in the Regional Director's earlier Report on Objections (dated July 26, 1990). The finding of a violation of Section 8(a)(1) may nevertheless constitute a basis for objectionable conduct, which it is, because it was litigated in an unfair labor practice case consolidated with a representation case. *Monroe Tube Co.*, 220 NLRB 302, 305 (1975).

(b) *Bugnitz' alleged April 27, 1990 threat to lay off 11 employees*

The complaint (subpar. 5(f)) alleges that Bugnitz, on or about April 27, 1990, threatened to layoff 11 employees if

<sup>8</sup>To the extent Respondent suggests that Merkt's three affidavits omit reference to this conversation (R. Br. 30), there were actually only two pertinent statements. His first statement, given before May 2, 1990, could not have contained any reference to this conversation.

the employees selected the Union as their bargaining representative. This also is alleged as objectionable conduct.

There is no dispute that on April 27, 1990, a conversation occurred among Bugnitz, the Union's organizer, Andrew Charnick, an employee of Respondent (Henderson) and a union business agent representing employees at the nearby Progresso Plant, Larry Wright. At about 3 p.m., while Charnick was about to distribute leaflets to Respondent's day-shift employees, he was joined by Union Agent Wright and employee Henderson. Bugnitz approached the group, introduced himself to Charnick and Wright, and told them he was there to make sure that they were not crossing the property line, thereby trespassing on Respondent's property in order to solicit Respondent's employees for the Union.

According to Charnick, when Bugnitz told the group that he had been a member of the Union while working at Respondent's Baltimore plant, Charnick asked Bugnitz why he was fighting so hard to keep the Union out of the Vineland plant. Bugnitz said that he could not afford the Union and that he was already 11 men overstaffed since the past November. Bugnitz then turned to employee Henderson and asked him if that were not so, but Charnick directed Henderson not to answer the question. When Bugnitz told them that Respondent's Vineland plant was the highest paying plant in the county, Charnick told him that Progressive Foods, next door, paid more than Respondent and that Respondent had made a lot of money at the Vineland plant. Bugnitz responded that Respondent had a "2-piece line they were putting in, which cost a lot of money" (Tr. 58). Charnick told him that he felt that a small part of Respondent's profit at the Vineland plant should go to the employees under a master agreement with the Steelworkers' Union (Tr. 58-59). According to Charnick, Bugnitz repeated to him that he was "11 men over" (Tr. 59). Charnick insisted that Bugnitz said that he could not afford the Steelworkers' contract; that Charnick replied that other Respondent plants had the Steelworkers' master agreement and that even in areas of the country where the cost of living was much less than where the Vineland plant was located, the employees under the master agreement were making more money than Respondent was paying the Vineland employees (Tr. 60). Whereas Charnick particularly denied that Bugnitz' statement (of being 11 employees overstaffed) also included that he would lay off 11 employees, Henderson testified (Tr. 369) that Bugnitz said that he could not afford the Union and, if the Union gets in, he would have to lay off at least 11 people because he was overstaffed. Bugnitz specifically denied making any statement regarding the layoff of employees (Tr. 738).

Bugnitz testified, in substance, that he told the Progresso union agent in discussing the Steelworkers' aim of job security: "Well, the people in this facility have job security, that is why we have been carrying 10 to 12 extra people for the last 3 or 4 months" (Tr. 737). Respondent therefore defends (R. Br. 71) on the ground that Bugnitz, under the credible evidence, made no reference to layoffs during this conversation and that employee Henderson's assertion that Bugnitz threatened to lay off at least 11 employees contradicted Charnick's express denial that such a statement was made. Thus, if Charnick's version is credited and Bugnitz denied making any reference to laying off employees, what is left is merely a statement that Respondent's employees at Vine-

land have job security which is proven by Respondent's carrying 10 to 12 extra people for the last 3 or 4 months. Inspection of that testimony demonstrates no implication of a threat to lay off. I credit Charnick and Bugnitz rather than Henderson. In light of this finding, I need not reach Respondent's further positions and explanations of this event. I therefore recommend that paragraph 5(f) be dismissed on the ground that the General Counsel failed to prove that Bugnitz threatened to lay off any employees for any reason.

*(c) Bugnitz' alleged postelection statement regarding laying off employees if the Union won the election*

Employee Gary Miller testified that within about an hour after he voted in the May 3, 1990 election, and therefore sometime after 11:30 p.m., from a distance of 10 feet, he saw and heard Bugnitz and two employees in the office (Tr. 312). Miller testified that Bugnitz said that the Union "would have done him a favor by coming in because he would have been able to—he would have laid off so many people, laid off those people without no regrets" (Tr. 312). He recalls nothing further in the conversation and could not recall whether any of the employees said anything (Tr. 313). He recognized the persons with Bugnitz as employees with whom he worked on a regular basis (Tr. 335), but he testified that he could not recall who they were.

Bugnitz denied any such conversation and denied the existence of any employees in the office area following the ballot counting (Tr. 765). The only postelection conversation he had was a telephone call to his immediate superior informing him of the results of the election about 15 minutes after the 11:30 p.m. ballot count after which he left the building (Tr. 764).

*D. Discussion and Conclusions*

Bugnitz denied any such conversation. Miller testified that he recognized the persons to whom Bugnitz allegedly made his remarks as "people [he] worked with on a regular basis at the plant known to [him] as Continental Can Employees" (Tr. 335). I conclude that either the conversation never occurred as Miller described or that Miller, for reasons unknown on this record, was protecting the identity of the employees in the office with Bugnitz. He could not have recognized them as coemployees with whom he regularly worked, standing 10 feet away, and reasonably not be able to recall who they were. If his recollection is so poor with regard to the identity of the two employees whom he recognized as his fellow employees, regularly working with him at the plant, I do not believe his recollection of the conversation merits crediting.

I therefore recommend that paragraph 5(j) of the complaint which encompasses this alleged conversation be dismissed as unproven.

*1. The alleged Bugnitz threats of layoff in the February 22, 1990 shift meetings—background*

The Vineland plant, prior to the union organizing drive, had two production lines (line 1 and line 2). Both were "3-piece" lines. The three pieces, fabricated into a can, consist of the can cylinder with separate top and bottom ends or "lids." The production process required a total complement of 31 employees on three shifts. As above noted, about 85

percent of the can production at Vineland went to the adjoining Progresso Foods plant connected to the Vineland Plant by a conveyor belt (Tr. 670).

Sometime prior to around November 1989, a technological change permitted the replacement of one three-piece can line by a two-piece line (requiring a single top and no bottom lid). As a result, in or about late December 1989, Respondent disassembled one of its three-piece lines (line "two") to make way for the anticipated introduction of a two-piece line. The new two-piece Vineland line would manufacture cans only for the primary customer, Progresso Foods. The new two-piece line would not become operational until March 1990 but the December 1989 removal of one of the two three-piece lines cut in half the number of employees needed for existing production in the Vineland plant. Thus, at the end of 1989 and the beginning of 1990, there were production employees without a production function among the 31 unit employees.

Respondent also planned to remove the remaining three-piece line (line 1) as soon as the new two-piece line became operational in March 1990. Respondent contemplated that the two-piece line, after the removal of the remaining three-piece line, would be the only piece of equipment running at the Vineland plant. In that eventuality, Respondent would have work for only 17 of the 31 employees at the plant (R. Br. 17; Tr. 718). Respondent intended, nevertheless, to continue in operation both the anticipated new, two-piece line and the remaining three-piece line in the period March through June 1990. In order to operate those two lines in that particular 3-month period, Respondent would not need 31 employees; it would need about 24 (Tr. 718-720). I conclude, therefore, that in late 1989, Respondent anticipated, in any case, that by June 1990, a period 6 months thereafter, it would lay off at least 7 of its 31 employees, with a total of 14 to be laid off when the two-piece line became the sole production line shortly thereafter.

Respondent, however, had hopes for new work for its employees to take the place of work lost to the new technology. In no case, however, did Respondent want to lose its skilled employees whose services might well be needed at least in the short term.

With the removal of line 2 in December 1989 and line 1 remaining in operation, Respondent, in January 1990, laid off its two most junior employees. Consistent with its then having an excess of production employees, Bugnitz successfully sought out short-term projects to keep the remaining employees occupied. During the period January through March 1990, Bugnitz succeeded in having the disconnected line 2 equipment overhauled, cleaned, and painted in the Vineland plant using unit employees rather than the equipment undergoing such rehabilitation in a sister plant (Tr. 671). In addition, Bugnitz sought and received from another Respondent plant an overhaul project which would require 6 to 9 weeks of work, paid for by the sister plant, yet keeping Respondent's Vineland employees occupied. Furthermore, the Vineland employees painted the entire Vineland plant, revamped the office area, and sent some of its employees to sister plants to conduct classes, perform repair work for them, and have the other plants ultimately absorb Respondent's payroll costs for those employees (Tr. 672-673).

In the period 3 to 5 months prior to the February 1990 union organizational drive, Bugnitz had been holding meet-

ings with employees stressing the subject of "job security" and "cost" (Tr. 172). In fact, these subjects had been discussed by management with employees for many years. In particular, Bugnitz mentioned, in the context of the anticipated removal of the second of the two three-piece lines, the effect on plant jobs: that there would be less work and that there would be fewer jobs (Tr. 173). Indeed, he spoke about a layoff procedure in those meetings (Tr. 173-174). Ever since Bugnitz became plant manager on January 1, 1989 (Tr. 659), he regularly told the employees of his concerns about cost and job security, all before the Union's organizational drive in February 1990. With the dismantling of line 2, he reminded them that, short of the plant's obtaining new work, there were 10 or 12 employees who were being kept busy on work other than regular production jobs; that to save those jobs, the Vineland plant would have to get more business (Tr. 380). With respect to "more business," the two sources mentioned were (1) a "can handling system" from Progresso; and (2) an "end press" from Respondent's Hurlock, Maryland plant. Bugnitz, and other Respondent agents, both before and after the Union's February 1990 organizing drive, stressed in employee meetings that to avoid layoff of 10 to 12 employees, *both* new sources of work had to be established in the Vineland plant (R. Br. 26).

## 2. The end press

An end press makes the tops and/or bottoms ("lids") for a can (Tr. 741). It is not a can producing line (Tr. 741).<sup>9</sup> Just as "cost," according to the testimony of General Counsel witness Merkt, had been the subject of discussion at the Vineland plant for many years, Respondent's transfer of end press equipment into the Vineland plant had been "kicking around" for 10 years: the Baltimore plant was going to close and maybe Vineland was going to get the Hurlock end press equipment (Tr. 376-377). In the 3- to 4-month period prior to the Union's organizing drive, Bugnitz told the employee that it was "possible" that they would get the end press equipment (Tr. 377-378). After the Union appeared, Bugnitz and other supervisors at first told them it was all but certain (Tr. 136; 703) but later said it might have to be reviewed (Tr. 363) and, finally, that it had been put on hold (Tr. 773). In its April 17 letter to employees (G.C. Exh. 8), Respondent resolved all prior ambiguity. See *infra*.

## 3. The can handling system

The metal cans used by Progresso and produced, in large part, by Respondent's Vineland plant are stored on pallets. Progresso can handling equipment removes cans from the pallets and sweeps them onto a conveyor and then directly into the production lines (Tr. 617). Progresso had several locations of depalletizing can handling equipment and, by the mid-1980s, decided to centralize the system, perhaps contracting out its can handling work to Respondent in the Vine-

<sup>9</sup>Due to a high employee attrition rate at its Baltimore plant, Respondent planned to move a large end press from the Baltimore plant to the Hurlock plant. In order for the Hurlock plant to receive the Baltimore end press, the Hurlock plant was obliged to move its own end press to make room for it. With the movement of the Baltimore end press to Hurlock, the Hurlock end press had to be moved to another plant. Both the Baltimore plant and the Hurlock plant are covered by the Steelworkers' master agreement (R. Br. 22; Tr. 749).

land plant. By September 1988, Progresso entered into a 7-year can supply agreement with Respondent which mentioned the can handling system and the possibility of placing it on Respondent's premises to be operated by Respondent's employees, rather than by Progresso's, notwithstanding that Progresso would continue to own the equipment. Respondent demanded a price of \$2.50 per 1000 cans handled, but Progresso forced Respondent to settle for \$2 per 1000 (Tr. 592). Apparently all the costs of operating the can handling system would be labor cost (Tr. 626-627).

On the other hand, as the General Counsel observes (G.C. Br. 22) the can supply agreement between Progresso and Respondent (R. Exh. 5, pars. 7(b) and (c)) provides for a "pass through" of increased costs, including labor costs. Respondent concedes the existence of the automatic "pass through" of labor cost (R. Br. 21) but contends that Progresso continued to have the option of not paying the increased labor cost by electing to place the can handling system on its own premises, thus foreclosing use of Respondent's employees.

In June or July 1989, 7 months before the Union's organizing drive, Progresso ordered the new can handling equipment (Tr. 624). Engineers of the can handling manufacturer had been at the Vineland plant to inspect the premises for placement in Vineland. Though it was ordered almost a year before anticipated delivery in or about June or July 1990 (Tr. 623), it would arrive in a condition to be installed either at Progresso or at Respondent's Vineland facility at Progresso's option (Tr. 629).

*E. Bugnitz' Speeches to Employees at Meetings on February 22 and 23, 1990*

Bugnitz' late morning unlawful interrogation of Carl Merkt on February 22, above-described, ended about noon (Tr. 134). About 2:30 p.m., on the same day, Merkt was on the production line. Supervisor Ciuffetelli told him that there would be a meeting in the cafeteria at 2:30 or 3 p.m. that day (Tr. 135). Present at the meeting was the entire day shift of about 10 employees, the office personnel, and 3 or 4 supervisors, about 15 or 16 persons altogether (Tr. 135). John Bugnitz was the only speaker. He mentioned the Union's letter concerning the forthcoming union meeting at the nearby motel; he said he hoped that they would not go, but if they did, and if the Union got into the plant, the cost factor would affect their relationship with Progresso. He told them that end press and can handling equipment were to be coming into the plant, but if the Union got into the plant, the cost factor would make some of these things "maybe not even come" (Tr. 136). At this point, according to Merkt, Bugnitz looked down at a piece of paper on the table in front of him and said that, as he looked at the seniority list, he did not see "anyone past number 16 remaining in the plant" (Tr. 137). Merkt recalled that although the meeting started with Bugnitz' being calm, during the meeting, as he explained the Company's position, he became excited (Tr. 142). This meeting was for the day-shift employees who worked 7 a.m. to 3 p.m. One-half hour later, about 3 p.m., the second-shift employees (3 to 11 p.m.) attended a similar meeting. The third-shift employees (11 p.m. to 7 a.m.) were at a similar meeting at 7 a.m. on the next day, February 23.

Employee Joseph Greene, also at the first-shift meeting with Merkt, confirmed the presence of the three supervisors and that Bugnitz appeared to be upset and spoke in a loud

voice. Greene recalls that Bugnitz told the assembled first-shift employees that he took a "personal view" of the union drive and that he "took it as a reflection upon himself" (Tr. 424). Bugnitz said he was upset because the employees did not come to him (with their problems) before going to the Union. Corroborating Merkt's testimony in large part, Greene testified that Bugnitz said that he could "look down the employee list and see only 16 people being employed" (Tr. 424). Greene also testified that "they [Respondent] would have to take a look at the can handling system and the end press coming into the plant" and that "the can handling system might be put [into] the Progresso plant" (Tr. 424-425). He also recalls that Bugnitz stated that the reason that Respondent would have to review the transfer of the end press equipment and the installation of the Progresso can handling equipment was because of the high cost of the union contract benefit package in the Union's master agreement (Tr. 434). He recalled that this higher cost caused the Progresso plant manager to be "scared shitless." This latter expression may have been used by Bugnitz in later employee meetings rather than at the February 22-23 meetings.

Robert Henderson, a machine operator at Vineland for about 15-1/2 years, is a second-shift employee working 3 to 11 p.m. He attended the meeting of second-shift employees in the cafeteria about a half-hour after Bugnitz addressed the first-shift employees. About 10 or 11 employees on the second shift attended the meeting.<sup>10</sup>

Henderson recalls that Bugnitz told the second-shift employees that he was upset because he had received a copy of the union letter relating to a future meeting; that it was not "fair" because none of the employees had mentioned the Union to him and that "this was all done behind his back" (Tr. 362). Henderson also recalled that Bugnitz said that if the Union got into the plant, "we wouldn't get the end presses because it would go to a plant that would make [the 'lids'] cheaper" (Tr. 363, 382-393). He also recalled that Bugnitz said: "We can't afford a union, we'd have to let some people go" (Tr. 383).

Gary Miller, along with seven other third-shift employees, attended the third meeting addressed by Bugnitz at 7 a.m. on Friday, February 23 (Tr. 282-283). Miller, corroborating Merkt and Henderson, recalls that Bugnitz told them that he was upset because the employees had gone behind his back to get a union in and that although employees were working in spite of the removal of one of the two three-piece lines (Tr. 284), "if the union came in that he'd have to lay off people" (Tr. 285). Miller recalls that Bugnitz told the third-shift employees that Respondent was keeping employees employed notwithstanding that they were not doing their regular jobs and that Respondent was losing money by keeping the employees employed "all that time" (Tr. 285); that because Respondent was losing money every week, if the Union came in they would probably have to lay off employees (Tr. 288).

*F. The Testimony of John Bugnitz Relating to the February 22-23, 1990 Meetings with Employees*

Bugnitz testified that on showing the assembled employees at the first shift a copy of the letter relating to the forthcom-

<sup>10</sup> Henderson mistakenly placed the meeting in March whereas it was on February 22, 1990 (Tr. 362).

ing union meeting, he told them that he was very upset because none of the employees trusted him enough to bring the issues to him and permit him to address those issues to his superiors (Tr. 700–701). With regard to the letter raising the subject of job security, he told the employees of his experiences with the Union and the high costs involved in Steelworkers' arrangements. He told them that he had been a steelworker and a supervisor in plants working under the Union's master agreement for over 20 years; that in his experience at the Respondent's St. Louis facility, there were 780 employees there when he was both an hourly employee and a supervisor; and that there were presently slightly over 200 employees employed there. Again, when he was a supervisor at the Baltimore plant in 1977, there were well over 200 employees in the plant, and when he left there were only 100. Similarly, he said that while he was acting plant manager at Respondent's Lancaster facility, the Union's master contract was applied there. The resulting costs made the plant uncompetitive and he had the "unfortunate duty of shutting down the plant where 87 people lost their jobs" (Tr. 702). He admitted that he was excited and that his voice rose (Tr. 702).

Bugnitz then told the employees that this (the union organizational drive) could not come at a worse time because "we have two projects on the drawing board that are going to affect the employment level of [the Vineland] plant" (Tr. 702–703). Bugnitz testified that he told the employees (Tr. 703):

Basically, in other words, we have 10 or 12 extra on the manning right now, we need the can handling system and the [end press] project come into that plant to utilize the people that are over and above our required manning. [I] also told them that those projects were based on cost, and that basically the only way we could probably lose those projects was to increase our cost and become uncompetitive with our other plants.

Although Bugnitz denied specifically referring to the contract between Progresso and Respondent, he told the employees at all the meetings that the Progresso can handling system was based on a cost of \$2 per 1000 and that was a key factor in the can handling system (Tr. 704).

Although Bugnitz admitted at the hearing that foreign competition and newer and better machinery caused layoffs as well as labor costs, he did not mention these items in his speeches (Tr. 707). Bugnitz' testimony was contradictory on whether he told the employees that it was the increased labor costs associated with the Steelworkers' master agreement that caused the layoffs. Ultimately, Bugnitz denied having told the employees at that, or any other meeting, that it was the Union's master agreement costs that caused the layoffs (Tr. 709). He insisted that he referred only to "costs" and that the increase in costs "could jeopardize two projects that was [sic] slated for [the Vineland plant] which were very necessary to keep the 10 or 12 extra people that we had been carrying for 3 months employed in the Vineland facility" (Tr. 710). He then appeared to agree that he said it was the higher labor costs of the master agreement that could jeopardize the two projects closing into the plant (Tr. 711; 715). He denied referring to any seniority list and saying that he could see the names of 16 employees that were going to be laid off (Tr. 715–716).

When it was then specifically called to his attention whether he ever mentioned the master contract at the February 22 and 23 meetings, he said that he did not mention the master agreement; rather he spoke only of "cost" (Tr. 730; 771–772). His prior testimony (Tr. 706) was to the contrary.

In late March 1990, Bugnitz told the employees that the decision on the end press had been put on hold (Tr. 773). It was not until sometime in May or June, after the May 3 election, that he told the employees that the end press was not coming into the Vineland facility and that one of the reasons was that the attrition rate at the Baltimore plant had slowed (Tr. 774).

Bugnitz testified (Tr. 758) that his superiors in Respondent told him in March 1990 that the end press installation at Vineland had been "put on hold," that he told the employees at about the same time that the end press had been put on hold because if the employees came under the master agreement of the Steelworkers, there would be no cost advantage in placing the end press in the Vineland plant (Tr. 759). This, of course was different from Respondent's post-election reason for noninstallation of the Hurlock end press: that the Baltimore employee attrition rate had slowed (Tr. 774).

*G. Discussion and Conclusions—Bugnitz' Speeches to Employees on February 22 and 23, 1990, violate Section 8(a)(1) of the Act*

Complaint paragraph 5(c) alleges violation of Section 8(a)(1) of the Act in that Bugnitz' February 22, 1990 speeches to employees stated (i) that he was angry that the employees were trying to get the Union in and was upset that the employees had gone behind his back, and (ii) threatened employees with layoff if they selected the Union as their bargaining representative. These allegations, if supported, indeed constitute violation of Section 8(a)(1) of the Act but, in view of the date of their occurrence, before the filing of the March 1, 1990 petition for certification, these alleged unfair labor practices may not form the basis of objections for the purpose of setting aside the election. Such conduct falls outside the critical period between the filing of the petition on March 1, 1990, and the holding of the election on May 3, 1990. *Ideal Electric Co.*, 134 NLRB 1275 (1961).

With regard to the first allegations of violation of Section 8(a)(1), I have discovered no use of the word "angry" in describing what Plant Manager Bugnitz actually said. He admitted (Tr. 701) that in his speeches to the three shifts of employees on February 22–23, all of which were substantively the same, he was "very upset, and the reason was that . . . nobody trusted [me] enough to bring the issues to me and give me a shot at taking them . . . to my superiors to resolve whatever issues that they had." In addition, there can be no question, as Bugnitz himself admitted, and the General Counsel's witnesses confirmed, that as Merkt testified Bugnitz became excited, becoming caught up in what he was saying. Employee Henderson recalled that Bugnitz said it was not fair to him that the employees had gone to the Union and that it was "all done behind his back" (Tr. 362).

In Bugnitz' morning unlawful interrogation of employee Carl Merkt, he repeatedly asked Merkt why Merkt had not come to him first, stating that he had thought they had a better relationship. After Merkt reassured him that it was not

“personal” and that it was “an economic situation” that required outside representation,” Bugnitz responded that the employees’ action was a “direct reflection upon my managerial ability” (Tr. 133). He then repeatedly told Merkt that he was “upset with the fact that you didn’t come to me” (Tr. 134). Such statements are consistent with Bugnitz’ own admissions of being upset and go advising the employees at the February 22 meeting and employee Henderson’s recollection that Bugnitz said that the employees had “gone behind his back.” I am constrained to find, as alleged by the General Counsel, that the statements in the meeting, alone, communicated to the employees that their protected conduct was viewed by Bugnitz as disloyal. I further agree that the context of the statements on February 22–23 included an assertion that Bugnitz had kept the employees on the payroll in spite of line 2 having been removed and, if the Union came in, Respondent would have to lay off employees (Tr. 284–285). Indeed he told them that Respondent was maintaining the employment of these employees who were not engaged in production work notwithstanding that Respondent was losing money by keeping these people employed all that time. The suggestion of layoff was in a context of employee ingratitude, particularly that the employees went behind Bugnitz’ back to get a union in when Respondent was keeping otherwise unemployable employees on the payroll (Tr. 286).

Bugnitz’ statement to all the employees that they had gone behind his back in getting the Union and their ingratitude in doing so in spite of the fact that Respondent kept in employment employees who would otherwise be laid off, conveyed to the employees the message that Respondent equated engaging in union activity, a protected statutory right, with employee disloyalty. Such a statement, though made during emotional circumstances, tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. *Oscar Enterprises*, 214 NLRB 823 (1974).

Respondent defends on the grounds that Bugnitz was merely restating the employees’ long understood work shortage problem together with the necessity that costs must be kept under control to attract the two projects (can handling system and end press equipment) necessary to keep them employed and to avoid layoffs. Respondent urges that in the speeches, Bugnitz “gave no indication of anti-union animus or possible retaliation against the employees” (R. Br. 69–70). The preponderance of credible evidence, including Bugnitz’ admissions of being upset over the employee actions, leads me to conclude that counsel misreads the evidence in ascribing to Bugnitz no unlawful union animus and threat of retaliation. In short, with regard to the first allegation of the complaint, Bugnitz’ speeches to the employees on February 22–23, with unmistakable accusations of employee disloyalty, violate Section 8(a)(1) of the Act as alleged.

(b) Paragraph 5(c) of the complaint also alleges violation due to Bugnitz’ alleged retaliatory threats to the employees that they would be laid off if they selected the Union as their bargaining representative.

The issue is whether Bugnitz’ statements constituted unlawful threats of layoff in retaliation for employees’ union activities or were lawful predictions of the economic consequences of the high cost of unionization.

The distinction between permissible employer predictions of the consequences of unionization under Section 8(c) of the Act and unlawful employer threats under Section 8(a)(1) of the Act was established in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Under *Gissel*, an employer may tell its employees its views about a particular union or its general views about unionism but may not issue threats of reprisals or promises of benefit. The employer may even make a prediction as to the precise effects he believes unionization will have on his operation but, under *Gissel*, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. *NLRB v. Gissel*, supra, 395 U.S. at 618.

The actual application of the *Gissel* requirement that the employer’s prediction of adverse job consequences (whether the closedown of the plant or the layoff of the employees) be based on “reasons beyond its control” often presents close and difficult questions. On the one hand, the Board has held, *Benjamin Coal Co.*, 294 NLRB 572 (1989), that an employer may lawfully predict a shutdown because of its own precarious economic condition confronted by the Union’s adamant economic demands. On the other hand, the employer’s demonstration of “probable consequences of unionization for reasons beyond its control,” *Auto Workers v. NLRB*, 127 LRRM 2060, 2063 (9th Cir. 1987), citing *Zim’s Foodliner v. NLRB*, 495 F.2d 1131, 1137, cert. denied 419 U.S. 838 (1974), did not meet the *Gissel* requirement for such a demonstration where there was merely a good faith concern for higher labor cost and an inability to compete coupled with a threat to shut down. In that case, there was an insufficient objective basis on which the threat was made. In particular, the *Zim’s Foodliner* court, 85 LRRM at 3023 stressed the *Gissel* requirement that the “demonstrably probable consequences” be “beyond his control.” The burden is on the employer to justify his prediction of closedown (or, as here, layoff), with objective evidence, *Zim’s Foodliner*, supra at 3023, citing cases. In *Harrison Steel Castings*, 293 NLRB 1158 (1989), the Board stated that in the presence of “manifested overt hostility to the union activists in its work force,” an employer could not “suggest the loss of jobs as a result of loss of business [to competitors] without demonstrating to employees that such a chain of causation would be brought about through forces beyond [the employer’s] control.” See *Somerset Welding & Steel*, 304 NLRB 32 (1991).

Further, as above noted, Bugnitz’ February 22–23 speeches to the employees as well as Respondent’s other communications to the employees, occurring both in writing and in its weekly meetings with employees, commencing in the week following Bugnitz’ February 22 speeches until the election, are surrounded by the aura of Bugnitz’ union animus. I have found that his February 22 speech, accusing the employees of “going behind his back” as an act of employee disloyalty, violates Section 8(a)(1) of the Act. Moreover, antiunion animus is no less antiunion animus simply because it springs from serious economic considerations such as cost. Indeed, in the majority of cases where employers commit unfair labor practices and thereby impede the election process, the employers break the law primarily out of concern for their economic welfare. *NLRB v. C.J.R. Transfer*, 936 F.2d 279 (6th Cir. 1991), enfg. 298 NLRB 579 (1990).

In the instant case, I accept Respondent's statements (R. Br. 68-69) that Bugnitz, in the preunion organization period, held meetings with unit employees stressing the importance of keeping costs down in order to attract new business which would, in the face of the existing work shortage in the Vineland plant, protect the employees' jobs. In particular, both the preunion meetings, Bugnitz' speeches, and Respondent's other communications with its employees before the election focus on obtaining new work to protect the employees' jobs. I further agree that Bugnitz (and other Respondent communications to its employees) stressed the need for Respondent to maintain a competitive cost position in order to attract the new work which would, in turn, protect the employees' jobs and insure them against layoffs. In particular, the new work which Respondent intended to bring into the Vineland plant to insure against layoffs were Progresso's can handling equipment *and* the transfer of "end press" equipment from the Hurlock plant as the other necessary additional new work. Respondent asserts:

[t]he discussion [by Bugnitz at the February 22-23 meetings with employees] was simply a continuation of the employee meetings that Bugnitz had conducted months before the Union became an issue. These pre-organizing drive meetings stressed the importance of keeping cost down in order to attract the can handling and end press project, and warned that these projects would be essential to preserve job security at the plant. Once the labor costs of the Master Agreement became an issue, the Company also focused on explaining how the Agreement's terms would apply automatically to the employees, pointing out the impact that the unavoidable 30-35% increase in labor cost would have on the Company's ability to compete for new projects. The objective, economic basis for these predictions, as described in the statements themselves, demonstrates that these explanations were entirely lawful descriptions of the demonstrably probable consequences of electing the Union, consequences that fell entirely outside the Company's control.

Again, Respondent stresses that the importance of the acquisition of *both* of these projects was repeatedly discussed with the employees by Respondent. In the same vein, employee Merkt testified that at the February 22 shift meeting he attended, Bugnitz warned that the cost factor associated with the Steelworkers getting into the plant might prevent Respondent from obtaining the end press *and* the can handling system (Tr. 136). Similarly, in Respondent's written communication to its employees of April 17, 1990 (G.C. Exh. 8), Respondent warned its employees:

THIS IS A CRITICAL TIME AT VINELAND. Much is on the line, and much is up in the air. To protect jobs it will be necessary to move an end press to Vineland and assume all of Progresso's can handling work.

Lastly, Respondent particularizes Bugnitz' warning at the February 22-23 meeting to Respondent's employees "of the need to attract the can handling system *and* press equipment in the plant. The employees were already aware of the importance of these projects." (Emphasis added; R. Br. 69.) Bugnitz told the employees that the "two projects were . . .

very necessary to keep the 10 or 12 extra people . . . employed." (Tr. 710.)

In short, therefore, I find and conclude that Respondent, at all material times, warned its employees that if they did not receive *both* the end press equipment and the Progresso can handling equipment, there would be layoffs. It therefore follows that, if Respondent failed to attract only one of the two "new work" elements, then there would be layoffs in the plant. In other words, both elements of new work were necessary in order to preserve jobs under Respondent's consistent warnings in this case.

On the basis of this conclusion, I find it unnecessary to reach or decide the effect of Respondent's "prediction" or "threat" of the effect of the Union's high cost contract, automatically to be applied to the Vineland unit on union certification or recognition, with regard to the Progresso can handling system. Rather, I conclude that if the prediction of layoff on the failure of the Vineland plant to receive only the "end press" equipment amounts to an unlawful "threat," violating Section 8(a)(1) of the Act, then Bugnitz' entire February 22-23 speeches to the employees were tainted by inclusion merely of the unlawful threat of layoff based on the failure to obtain the end press equipment. This would be true regardless whether the companion prediction of layoff based on failure to receive the Progresso can handling equipment may also have been an unlawful threat.

The issue of whether the Vineland plant would receive the end press equipment, due to the transfers of such equipment from Respondent's other plants, had been "kicking around" for 10 years. The credible evidence shows that the "possibility" of that transfer had been long discussed and debated. The possibility of the transfer was historically based on the high attrition rate of employees at Respondent's Baltimore plant; the transfer of certain end press equipment from the Baltimore plant to the Hurlock plant; and the resulting transfer of the Hurlock end press equipment to the Vineland plant. As employee Merkt recalled, Bugnitz warned, in the February 22-23 speech to the first shift, that the high cost of the union contract might prevent the Vineland plant from receiving the end press equipment from Respondent's sister plant. Bugnitz says that he told the employee that:

those projects [the end press equipment and can handling equipment] were based on cost, and that basically the only way we could probably lose those projects was to increase our cost and become uncompetitive with our other plants. [Tr. 703.]

In fact, as early as the preunion period, Bugnitz told the Vineland employees in late 1989 (Tr. 746-747) that there was a tentative decision to bring the end press into the Vineland facility because the Vineland plant was the cheapest place to manufacture the "ends," produced by the end press. In the February 22-23 speech to employees, Bugnitz told the employees that with the advent of the Union and the automatic application of the Steelworkers' high cost master contract, the Vineland plant would probably lose both projects because the increased costs would make Respondent's Vineland plant "uncompetitive with our other plants" (Tr. 703).

In short, Bugnitz did not tell the employees at the February 22-23 meetings that the increased costs under the automatic application of the union contract would definitely

cause them to lose the end press installation in the Vineland plant; rather, he told them that Respondent would have to reconsider any decision to place the end press equipment in the Vineland plant because the increase costs associated with the Union's success would make the Vineland plant "uncompetitive with our other plants" (Tr. 703). A clearer statement of Respondent retaining the *discretion* to provide work for the Vineland unit employees, or to withhold same, could not be made.<sup>11</sup> If it remains in Respondent's discretion, it cannot be said to be an economic result "beyond Respondent's control."

Where an employer tells its employees that a contemplated consolidation of tool and die work in the plant, which would mean plant expansion and more jobs for the employees, would have to be reconsidered in the event of a union victory, this statement constituted an implied threat to withhold this benefit if the employees selected the Union. Threats to cancel plans for plant expansion because of the advent of the Union, or as here, to prevent new work from coming into the plant to increase jobs, are violations of Section 8(a)(1) of the Act. *Maremont Corp.*, 294 NLRB 11 (1989); *Lion Uniform*, 259 NLRB 1141, 1143 (1982). Respondent's conditioning of this threat of withholding the transfer of the end press equipment, based on the increase cost due to the Steelworkers' contract, which would make the Vineland plant "uncompetitive with our other plants" (Tr. 703) is merely Respondent exercising its own discretion: evaluating the wisdom of continuing in its decision to place the end press in Vineland in the face of increased costs due to the automatic application of the Steelworkers' contract. The fact that Respondent's threat to its Vineland employees, that they would be laid off if the end press equipment was not installed, is based on a "concern for [its] economic welfare," *NLRB v. C.J.R. Transfer*, supra, is merely a statement that Respondent would have

to utilize its discretion in evaluating the wisdom of transferring the equipment into the Vineland plant.

Unlike *Benjamin Coal Co.*, 294 NLRB 572 (1989), where the lawful threat of job loss (shutdown) was predicated on the employer's undisputed precarious financial condition and the union's undisputed, known economic demands, here, Respondent threatens layoff solely because of the automatic application of the known high cost Steelworkers' contract which, because of a judgment on diminished profitability, will cause it not to transfer the end press. This latter *discretionary* act is not based on the workings of outside competitive forces; rather, it is based, on this record, on the Vineland plant's alleged resulting lack of competitiveness with Respondent's own unorganized sister plants. But there is nothing in the facts here to demonstrate what the wage scales, benefits, total costs, and efficiency of those unorganized sister plants consist of. On this record, Vineland's alleged resulting lack of competitiveness is not compared to facts from other plants. It is merely Respondent's ipse dixit. In short, Respondent's threat to cause Vineland layoffs (if the employees select the Union as their bargaining representative) by choosing not to transfer the end press because of Vineland's alleged resulting noncompetitive status is not a "prediction . . . phrased on the basis of objective fact to convey [Respondent's] belief as to demonstrably probable consequences beyond his control," *NLRB v. Gissel*, supra, 395 U.S. 575 at 618: (a) Respondent alludes only to the high cost master agreement but has provided no objective facts supporting Vineland's uncompetitive status compared to its sister plants; and (b) the uncompetitive Vineland status, if any, is not a matter of objective forces but is substantially subject to the exercise of Respondent's own discretion and even possible manipulation of the wages, benefits, costs, etc. in the sister plants.

Especially where, as here, Respondent has "manifested overt hostility to the union activists in its work force" (the treachery of employees of seeking union support, going behind Bugnitz' back, and adversely affecting his managerial status), it may not then "lawfully go on to suggest the loss of jobs as a result of loss of business to the competition [a fortiori, loss of business to its own sister plants] without demonstrating to employees that such a chain of causation would be brought about through forces beyond [its] control," *Harrison Steel Castings*, 293 NLRB 1158 (1989); *Somerset Welding & Steel*, 304 NLRB 32 (1991). As such, Bugnitz' speeches are unlawful threats rather than lawful predictions and fail to meet the standards established in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Bugnitz was making these unlawful threats to the entire unit thereby violated Section 8(a)(1) of the Act.<sup>12</sup> Compare Member Oviatt dissenting in *Somerset Welding*, supra.

#### H. Respondent's Meetings with Employees After February 22-23

About 2 or 3 weeks after Bugnitz' February 22-23 speeches to the unit employees, he convened about eight weekly meetings up through the time of the election (Tr. 143). At each of these meetings, where the Respondent's health package, thrift plan, or other subject was mentioned, Bugnitz al-

<sup>11</sup> Six weeks later, as will be seen infra, in the discussion concerning Bugnitz' April 17 letter (G.C. Exh. 8) to all employees, Respondent "took off the gloves." No longer was it presenting employees with the possibility of losing the end press and the can handling installations. Rather, equating the advent of the Union as creating an inefficient and uneconomical operation which would necessarily make Vineland uncompetitive, Respondent now directly states that it will not transfer the end press into the plant:

THIS IS A CRITICAL TIME AT VINELAND. Much is on the line, and much is up in the air. To protect jobs it will be necessary to move an end press to Vineland and assume all of Progresso's can handling work. *But*, those things can only occur IF we can carry out those operations efficiently and economically. IF NOT, THAT WORK WILL NOT BE DONE IN OUR VINELAND PLANT. IT WILL ONLY BE DONE HERE IF WE CAN MAINTAIN OUR COMPETITIVE ADVANTAGE. WE WILL *not* bring work into this plant—and our customer will seek other alternatives—if that work can't be done at a reasonable cost, a cost that allows both of us to make a fair return on our investment.

Where Respondent here insists on a "fair return on our investment" as a condition for ultimately not laying off the employees if they select the Union, the Board has held that a mine owner's speech during an organizing campaign, as here, stating: "if we could not sell coal at a profit we would not sell coal," was an unlawful implied threat to close the mine if the union won the election. *Superior Coal Co.*, 295 NLRB 439 (1989). Here, "we will not bring work into this plant—and our customer will seek other alternatives—if that work cannot be done at a reasonable cost, a cost that allows both of us to make a fair return on our investment."

<sup>12</sup> This violation of Sec. 8(a)(1) of the Act occurring before filing of the petition does not operate as an objection to the election.

ways discussed the jeopardy to the installation of the end press (and can handling system) in the event the Union became successful as the collective-bargaining representative (Tr. 143-144). Any such repetition after March 1 would necessarily violate Section 8(a)(1) and constitute objectionable conduct. In March 1990 (presumably after the March 1, 1990 filing of the petition for certification), Bugnitz told the employees that his superiors in Respondent, Jim Toomey and Tom Riker, told him that the installation of the end press in the Vineland plant was "being put on hold"; that the reason the end press had been destined for installation in the plant was because the Vineland plant had a cost advantage over Respondent's sister plants; and that if the employees came under the Union's master agreement that cost advantage would make the installation of the end press in the Vineland plant uneconomical (Tr. 759). On the above discussion, these March and April 1990 Bugnitz' statements at meetings of employees violate Section 8(a)(1) of the Act and are objectionable conduct (G.C. Exh. 1(j)). The failure of such installation, as above noted, would cause layoff of almost half the unit.

#### *I. Respondent's April 17, 1990 Letter to its Vineland Employees*

Bugnitz distributed a letter (G.C. Exh. 8) to its unit employees on or about April 17 relating to job security and layoffs. Paragraph 5(e) of the complaint alleges that Respondent's letter violated Section 8(a)(1) by threatening employee layoff if employees selected the Union.

The letter, over Bugnitz' signature, contains the following warnings and admonitions:

1. In the forthcoming May 3 election, each employee will decide whether he will turn over control of his future to the Union and to (unionized) people at other Continental Can plants.

2. The letter urges the employees to vote against the Union, one of the most important reasons for which is *job security* (emphasis in the original).

3. The letter notes that job security is a very important issue in the plant at that time because of the technological changes taking place: the change to the two-piece line the potential of gaining the Progresso can handling system, and the possibility of obtaining the end press. The letter asks: WHAT WILL HAPPEN TO *your* JOB? (Capitalization and emphasis in the original.)

4. The letter declares: NO UNION CAN GUARANTEE YOUR JOB SECURITY. (Capitalization in the original.)

5. The letter declares that job security comes only from Respondent's customers; the ability of the Vineland plant to provide a high quality product, on time, at a price Progresso is willing to pay.

6. The letter declares that, to protect jobs, it will be necessary to move an end press to Vineland and assume all Progresso's can handling work. Those operations will come to the Vineland plant only if the Vineland Plant can carry out those operations "efficiently and economically." "IF NOT, THAT WORK WILL *not* BE DONE IN OUR VINELAND PLANT. IT WILL ONLY BE DONE HERE IF WE CAN MAINTAIN OUR COMPETITIVE ADVANTAGE. WE WILL NOT BRING WORK INTO THIS PLANT—AND OUR CUSTOMERS WILL SEEK OTHER ALTERNATIVES—IF THAT WORK CAN'T BE DONE AT A REASONABLE COST . . . THAT ALLOWS BOTH OF US TO MAKE A

FAIR RETURN ON OUR INVESTMENT" (emphasis and capitalization in original).

#### 1. Discussion

Respondent, in this letter, it seems to me, is vividly repeating its prior threats to its employees that if they bring the Union in with its associated high contract cost, they will get neither the Progresso can handling equipment nor the end press, both of which are necessary for employee job security, i.e., if they bring the Union in with the high cost contract, the employees will face layoff because there's not enough work for them without the installation of both mechanical devices. The Bugnitz April 17 letter, however (G.C. Exh. 8), adds something new to what he told the employees in his February 22-23 speeches: the high labor costs of the Steelworkers' master agreement, brought into the Vineland plant, no longer will merely jeopardize the possibility of the two devices coming into the plant; they are no longer "on hold"; they are now not coming into the plant if the Steelworkers' contract comes in. Thus, employee jobs are in jeopardy (Tr. 711), pivoting on employees bringing in the Union with its contract.

On this latter point, Respondent not only cannot be accused of obscurity, but it adds an additional implied threat. At page 2 of the April 17 letter, Bugnitz tells employees that their jobs are not secure; that if Respondent does not do the work, others will come in and take the work away from them. Bugnitz then lists the Steelworkers' record not only on job security but *on plant closings*:

FACT NO. 1: In 1970, the Steel Workers Union represented Continental Can Employees under their master agreement at 45 locations. Today there are only 12 locations. Nearly 75% of the locations have been *closed*. That's 50 plant closings in total. Those locations that exist today have been cut way back.

FACT NO. 2: In 1970 there were approximately 17,500 Continental Can employees working under the Steel Workers master agreement. More than 1600 of those Continental Can employees (former U.S.W. members) have lost their jobs.

Bugnitz, in his testimony, admitted that in the packaging industry, in his 26 years of experience, layoffs and shutdowns are caused by reasons other than high cost of labor; admitted that foreign competition is a problem in the packaging industry although probably not in cans directly; and that competition from other producers who have better machinery and are closer to markets may also account for shutdowns and layoffs. In particular, Bugnitz admitted that labor costs may be a cause but not the only cause of layoffs and shutdowns in the canning industry (Tr. 705-706).

#### 2. Discussion

Again, Respondent's April 17 letter must be measured by the test in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

The Employer may even make a prediction as to the precise effects he believes unionization would have on his company. In such case, however, the prediction must be carefully phrased on the basis of objective fact

to convey an employer's belief as to demonstrably probable consequences beyond his control.

In his April 17 letter to employees, as in his February 22–23 speeches to the same employees, Bugnitz' message, regardless of what else it contains, associates membership in the Steelworkers' Union and its master agreement with plant closings and layoffs. It states that there had been 50 plant closings in Continental Can due to the advent of the master agreement. It goes further and states that since 1970, there was a loss of 16,000 out of 17,500 jobs because of the master agreement. This message, on the basis of Bugnitz' admissions of substantial other reasons for the closedown of plants and the loss of jobs (foreign competition, proximity to markets, new and advanced machinery, etc.) is therefore factually unbalanced. It does not advise the employees that their jobs may lack security for reasons other than the advent of the master agreement. The only reason he gives for plant closings and layoffs is the master agreement. In the instant case, again, that agreement is automatically applied if the Union becomes the unit bargaining representative.

Insofar as this record goes, as Bugnitz himself testified, the worst employment case he foresaw would be that the use of the new two-piece line, together with the expected closedown of the second three-piece line, would cause the layoff of approximately 7–10 employees. That would leave a balance of more than 20 employees on the 3 shifts. Respondent's April 17 letter, however, does not speak only in terms of *layoff* of employees but of repeated *closing* of plants where the master agreement became effective. That would mean that *all* the employees would lose their jobs if the master agreement came into effect. The threat of plant closing, as opposed to mere partial layoff, is unmistakable<sup>13</sup> in the April 17 letter. It discloses that of 45 locations in which the master agreement applied, there are only 12 locations left. It explicitly states: "Nearly 75 percent of the locations have been *closed*." It repeats: "That's 50 plant closing in total." On this record, Bugnitz knew, however, that there was *no anticipated plant closing* at the time he gave both the February 22 speeches and at the time of his April 17 letter; rather, he knew, under the worst case scenario, that 7 to 10 (14?) jobs might be lost (Tr. 654, 671) if neither the can handling equipment nor the end press equipment found a way into the Vineland plant. Contrary to the *Gissel* admonition, above, there is no basis whatever, much less an objective basis, on which Bugnitz could threaten the *closedown* of the Vineland plant. Thus, the April 17 letter contains a retaliatory threat of "close down" where there are no facts on this record to support the closing of the plant. Such a threat, wholly outside any consequences flowing from failure to receive the end press or the can handling equipment, violates Section 8(a)(1) of the Act as being retaliatory on the advent of the Union

rather than the application of the master agreement based on costs.

Finally, Respondent's April 17 letter declares for the first time that its threats of layoff and closedown are bottomed, not on extravagant union demands that will force it to the wall, *Benjamin Coal Co.*, 294 NLRB 572 (1989), but on obtaining "a fair return on our investment" (G.C. Exh. 8). Although there is nothing unlawful in such a financial expectation, it demonstrates that the decision to not install the end press was discretionary—to be determined wholly by Respondent's estimate of a "fair return." An ensuing layoff or closedown, resting on such a foundation, would hardly be beyond Respondent's control, hardly an objective standard. A "fair return" is a measure of Respondent's subjective desires.

For all the above reasons, I conclude that Respondent, in its April 17 letter to the employees (G.C. Exh. 8), threatened them with plant closedown and layoff because, in the exercise of its discretion, it would refuse to install, *inter alia*, the end press equipment in the plant if they chose the Union as their collective-bargaining representative. Especially when measured against the background of Bugnitz' clear union animus, as expressed in his February 22–23 speeches, Bugnitz' April 17 letter tended to cause employees to believe that they would be laid off or that the plant would be shut down if they selected the Union as their bargaining representative, *Harrison Steel Castings*, 293 NLRB 1158 (1989).

The fact that these expressions of union animus would derive from serious economic considerations does not save Respondent from having made an unlawful threat of retaliation in violation of Section 8(a)(1) of the Act. Compare *Maremont Corp.*, 294 NLRB 11 (1989), with *Benjamin Coal Co.*, 294 NLRB 572 (1989); see *NLRB v. C.I.R. Transfer*, 936 F.2d 279 (6th Cir. 1991), *enfg.* 298 NLRB 579 (1990).

#### *J. The April 25 Speeches of Donald Bireley and James Toomey to the Unit Employees*

Bireley and Toomey spoke to unit employees, at least to the first and second shifts, on April 25, 1990. The complaint fails to allege that any remarks they made to the employees at that time were unlawful (Tr. 794, 795). The General Counsel conceded that Toomey said nothing unlawful at the meeting (Tr. 793). As I stated at the hearing, I refuse to make a finding, despite extensive testimony in the record, on what was said by Toomey or Bireley at that meeting. Indeed, I precluded Respondent from inquiring as to what was said at the meeting by Toomey (Tr. 798). Under these circumstances, I continue in my decision to not decide the unlawfulness of any Toomey's or Bireley's *remarks* at the April 25 meeting other than that which was placed in evidence by Respondent, at Respondent's insistence (Tr. 792 to 796). What Toomey told the employees was read to them from a prepared text (R. Exh. 8; Tr. 792, 797–798).

In the document which Toomey read to the employees on or about April 25, 1990, 10 days before the election of May 3, 1990, and therefore within the "critical period," Toomey reminded the employees that Respondent invested \$3.6 million in Vineland technology, in the new two-piece line, because the Vineland plant was "nonunion with competitive rates." Respondent then stated: "I can assure you that if the cost of manufacture were higher, this project [the new technology] would be sitting on someone's desk collecting dust."

<sup>13</sup> *NLRB v. Overnite Transportation Co.*, 938 F.2d 815 (7th Cir. 1991): "Coercive threats may be implied rather than stated expressly." *National By-Products v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). We must be sensitive, moreover, to the "economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing*, *supra*, 395 U.S. at 617.

The Toomey speech from the prepared text then states (emphasis in the original):

What does tomorrow hold for the Vineland plant—the two projects which you are aware of, the end press and can center (which has been approved) are on hold pending the outcome of this election and will be, *re-evaluated* because they are very sensitive to increased costs. Both these projects were based upon a wage structure that was not calculated based on master agreement rates of pay and benefits. It appears your decision will have a significant impact on your future, not only for these projects but others as well. Let there be no mistake about it, you could be putting your jobs on the line. The increased cost of the master—which was not part of the calculation, would probably be the “death knell” to one or both of these projects. As we’ve said, this election isn’t just about money . . . . It’s about *jobs, your jobs*.

. . . .  
Don’t price yourself out of the market, and out of a job! Who should you entrust your job security to?—yourself or the USWA?—I think you’ve done an excellent job without them. Why risk the future, that work is yours . . . . *It should* be yours. You’ve earned it. Don’t throw it away.

The same employees who heard these remarks, who received the April 17 letter, above, and who heard Bugnitz’ February 22 and 23 speeches, all of which, under the *Gissel* rule, may be considered concerning what the employees *understood* in this April 25, 1990 speech, repeats to the employees that their *jobs are on the line* if they choose the Union. Again, though couched in terms of increased costs, in this speech, Respondent assured the employees not only that Respondent invested its capital in the Vineland plant because it was nonunion, but also tells the employees that it made a decision in the early 1970s to get out of high cost and inefficient unionized plants (only 12 of 45 master agreement plants have not been shutdown: G.C. Exh. 8, April 17, 1990) and to open new competitive plants that were nonunion. It further tells the employees that it makes investments to secure jobs in nonunion plants because they are “competitive.” Indeed, it tells the employees that it transferred business “from other plants” to keep “your employment fairly level when Progresso was slow.” It further states: “I think you get the picture.” Lastly, and significantly, it admonishes the employees that, with regard to the investment of capital in a plant to keep job security, not only the end press and the can center will be reevaluated if the employees choose the Union, but it assures the employees that if they select the Union, “the choice . . . will have a significant impact on your future, not only for these projects but others as well.” In no uncertain terms, Respondent tells the employees that if they choose the Union, Respondent will no longer invest in the Vineland plant and this will cause layoffs:

It appears your decision will have a significant impact on your future, not only for these projects but *others as well*. Let there be no mistake about it, you could be putting your jobs on the line.

Again, without Respondent demonstrating that its other nonunion plants are cost (or otherwise) “competitive,” Respondent here threatens, on the basis of lack of “competitiveness,” not only to avoid installing the end press and can handling equipment, but to not further invest in the Vineland plant in the future causing layoffs if the employees choose the Union. Respondent’s message was that capital investment means job security. Choose the Union and you are ipso facto not “competitive” and therefore no further capital investment. There is no basis—objective or otherwise—on this record, showing that Respondent’s nonunion and non-Steelworkers’ plants are “competitive” because they are not under the master agreement. I therefore find this to be a threat of job loss similar to the threat in the April 17 letter, a violation of Section 8(a)(1) of the Act, and a threat of retaliation which forms the basis of an objection to the election.

With regard both to this April 25 matter (R. Exh. 8) and the April 17 letter (G.C. Exh. 8), Respondent, at the time of the election and at the time of these speeches and letters, operated only 2 plants that were nonunion, 18 plants with other unions, and 12 plants with the instant United Steelworkers. At no point on this record did Respondent show, or even allege, that its operations at the 12 Steelworkers’ plants were not competitive with the industry or were losing economic propositions. Indeed, the record shows that Progresso was buying lids from a plant subject to the master agreement. At least in the 12 Steelworkers’ plants, there is no present suggestion that their operations were so unsuccessful that Respondent was going to close them down.

To the extent Respondent argues that Respondent delivered its message on costs and the problems of competitiveness in a “non-threatening manner,” both the substance of the communications and Bugnitz’ prior remarks obviate such an argument (R. Br. 70). Respondent’s union animus, whether orally delivered by Bugnitz or in Toomey’s speech or Bugnitz’ letter, is palpable.

*K. Respondent’s Prediction or Threat to Discontinue the Employees’ Thrift Plan—Paragraph 6 of the Complaint*

Although employee Henderson’s testimony with regard to the dates of occurrence was not a model of clarity, he testified that at one meeting at which Bugnitz spoke to employees, perhaps in March 1990, Bugnitz told the employees that if the employees chose the Union, the Vineland employees would probably lose their thrift plan (Tr. 367–368; 389). He recalled Bugnitz saying, in substance, that Vineland employees would “probably lose the thrift plan because its not in the other union plants or something to that effect” (Tr. 391). Henderson did not recall that Bugnitz linked the loss of the thrift plan with the Steelworkers’ master contract (Tr. 391).

In any event, as part of Respondent’s campaign effort, prior to the May 3 election, to warn of the effect of a union victory on the Vineland employees, especially the effect of the automatic application of the Steelworkers’ master agreement to their terms of employment, Respondent held a meeting of its employees on April 5, 1990. The meeting was led by Lynne Krueser (human resources manager from Respondent’s Rochelle Park offices) and assisted by Bugnitz. Krueser made a slide presentation to the employees demonstrating the advantages of Respondent’s total retirement package, includ-

ing its pension and its retirement thrift plan (RTP) over the pension provided by the Union's master agreement. At the meeting, a document, "Understanding Your Retirement Thrift Plan" (G.C. Exh. 6), was distributed to each employee (Tr. 113) and each page was projected in the slide show (Tr. 194).<sup>14</sup> Comparing nonunion and Steelworkers' benefits, the document matches employees in various Respondent pay positions and years of service with various combinations of benefits. In the first example, employees in the same job classification (job class 13), each with 25 years' service, receive a pension distribution under the nonunion Vineland pension arrangement of \$520 per month. A similar employee covered by the Union, again with 25 years' service, receives a pension under the master agreement of \$595 per month. The document shows that there is no RTP under the union contract but, in the Vineland plant, an employee with 25 years' service at age 62 with certain conditions having been met regarding years of RTP participation (15 years) and other options would receive an additional RTP distribution of \$384 per month. That particular comparison, therefore, shows that the Vineland employee covered by both nonunion *pension* and RTP receives a total retirement distribution of \$904 per month whereas the similar employee covered by the Union's master agreement receives only his pension of \$595 per month.

A further comparison relates to employees of 30 years' service in the same job classification (class 13) where the Vineland, nonunion employee has 25 years of RTP participation. The nonunion employee receives a *pension* at Vineland of \$624 per month whereas the similar employee covered by the master agreement receives \$714 per month. With 25 years of RTP participation, however, the nonunion employee receives an additional \$714 per month. The chart demonstrates that the nonunion Vineland employee would receive a monthly total of \$1338 (\$624 per month from the nonunion pension; \$714 per month from RTP) compared to a similarly situated employee covered by the master agreement who received a total pension of \$714 per month.

The handout further describes other comparisons of employees in the same job classification (job class 13) with 30 years' service. Using similar figures, the handout shows nonunion employees receiving \$2162 per month when RTP is added to a 30-year Respondent pension compared to a total of \$714 per month as the Union's pension. Lastly, the document also shows a nonunionized employee receiving a 30-year pension of \$624 per month with an RTP distribution of \$3210 per month, totaling \$3834 per month at Vineland. The similar union employee receives a total of \$714 per month in retirement.

The Respondent document (G.C. Exh. 6) ends with the statement that in the event the Union were to be successful in the organizing drive, future employee participation in the RTP would be discontinued immediately; there would be no additional employee or company matched contributions.

Krueser then told the employees that if the Union's master agreement were applied, Respondent would follow the procedure that it followed at other plants, repeating the matter

which appears at the end of the document: future participation in the RTP would be discontinued immediately with no additional employee or matching company contributions. When an employee asked whether the RTP would be lost if the Union were selected, Bugnitz said: "yes, you would lose it." Krueser said, "[A]bsolutely, and this is the reason why." Krueser then told the employees that because the RTP was not part of the master agreement's benefit package, it would be lost if the Union were elected. Krueser, independent of Bugnitz, told the employees of the automatic loss of the RTP (Tr. 195; 734).

Apparently in April 1990, at or about the time that Krueser was addressing the employees, Respondent distributed a memo ("Q & A") to all employees which explained the effect of the master agreement on the RTP (G.C. Exh. 7). This memorandum appears to answer a question from an employee wherein the employee quotes the Union as having said that if the Vineland employees chose the Union, they cannot lose existing benefits. In addition, the employee allegedly was told by the Union that if the Vineland employees had something "better than the Steelworker[s] agreement," they can get to keep it plus whatever else is in the agreement. The anonymous employee asked whether this was true.

Respondent's answer is:

Absolutely not. If the union wins the election, you would get exactly what is in the agreement, no more! If you have something that is *not* in the agreement, *you lose it*. IF YOU NOW HAVE SOMETHING THAT IS *better* THAN THE AGREEMENT, IT GETS REDUCED TO WHAT IS IN THE AGREEMENT.

That's exactly what happened at Lancaster in 1986 when the employees voted in the Steelworkers. The Lancaster employees *Lost* the right to participate in the Company's Retirement Thrift Plan, and they lost their *Performance Bonus*. [Of course, they lost much more when that plan closed in 1987.]

### 1. Discussion

As in the resolution of other complaint allegations, regarding "predictions" or "threats," the question whether Respondent's repeated assertion that a union election victory, coupled with the automatic application of the master agreement, would mean the loss of the retirement thrift plan constitutes a violation of Section 8(a)(1) of the Act, is to be measured under the *Gissel* rule, above. The question is whether Section 8(a)(1) of the Act is violated, because Respondent told the employees that union victory and the application of the master agreement would automatically cost them the retirement thrift plan. Again, *Gissel* requires an employer's lawful prediction of the demonstrably probable consequences be (a) beyond his control and (b) carefully phrased on the basis of objective fact.

There is no question, it seems to me, that as a *prima facie* matter, when the Respondent told its employees that a consequence of union victory would be immediate loss of the Vineland retirement thrift plan because of the automatic application, in turn, of the master agreement, it was making a "threat" of retaliation based on the automatic application of the master agreement. Thus, the interposition of the automatic application of the master agreement is necessarily a *defense* to the assertion that the "prediction" is not an unlaw-

<sup>14</sup> The complaint, par. 6, alleges that at the April 5, 1990 meeting, the Respondent, through Lynne Krueser, threatened the employees with the discontinuance of the "thrift plan" if the employees selected the Union as their collective-bargaining representative.

ful “threat” within the meaning of Section 8(a)(1) of the Act. Respondent is saying that it is the automatic application of the master agreement that is causing the loss of the RTP rather than the employees choosing the Union. In other words, I find that Respondent’s repeated statements of loss of the retirement thrift plan does constitute an unlawful “threat” unless excused by a defense established in the record.

Respondent’s defense, as I understand it, rests on (a) the language of the master agreement (now extended to February 21, 1993, G.C. Exh. 3(b)) which would be automatically applied in case of a union election victory and (b) the interpretation of that language as manifested by the past applications of the master agreement by the Union and Respondent in various situations over a period of years.

With regard to (a), above, the language of the master agreement,<sup>15</sup> it is article 4 of the master agreement which generally covers the survival of Local agreements, customs, and practices.

By *paragraph 4.1*, the instant master agreement supercedes written local agreements (and supplements executed under prior master agreements). Paragraph 4.1 applies to *written* local agreements. It thus would eliminate conflicting written agreements. To the extent that the Vineland pension agreement is a written agreement, it would be automatically superceded by the master agreement pension plan.

*Paragraph 4.2* provides: “Presently effective local customs or practices, written or oral, which are not specifically covered by provisions of this Agreement and which are not in conflict with its provisions shall remain in effect during the term of this Agreement.”

*Paragraph 4.3* provides: “Presently effective local customs or practices, written or oral, which provide benefits in excess of the specific benefits provided for through the provisions of this Agreement shall be continued for the term of this Agreement unless eliminated by mutual agreement.”

Thus under *article 4.2* local customs or practices, including oral customs or practices, which are (1) not specifically covered by the master agreement; and (2) which are not in conflict with the master agreement, remain in effect during the term of the master agreement. Under *article 4.3*, a local custom or practice, including an oral custom or practice, which provides *benefits in excess* of the *specific benefits* under the master agreement, *shall be continued* for the term of the agreement unless eliminated by mutual consent.

Respondent’s first argument, derived from the language of the master agreement, asserts that under article 4.2, the master agreement provides for the continuation only of local *customs and practices*, but (R. Br. 54):

conspicuously omits any reference to other benefits that may be in place locally but are not *specifically* provided for in the Master Agreement.

Certainly, these provisions taken together leave no room to speculate over the parties’ intent. The clear and unequivocal wording of the agreement, itself, demonstrates that benefits (like the Thrift Plan) that were

not specifically provided for in the Master Agreement *do not survive*. [Emphasis in the original.]

Although it is true that article 4.2 relates to the continuation of local customs or practices not in the master agreement and not in conflict with them, and also omits any reference to *benefits*, the reference to “benefits” appears in the next subsection, article 4.3.

*Article 4.3* relates to the *continuation of benefits*. Contrary to Respondent’s argument, above, it provides that a local custom or practice which grants “*benefits in excess of the specific benefits provided for through . . . this Agreement*” *survives*.

In short, article 4.2 provides for the continuation of local customs and practices which are neither specifically covered by the agreement nor in conflict with it. Section 4.3, however, addresses the specific existence of “*benefits in excess of the specific benefits*” *provided for in the master agreement*. Those excess specific benefits are to be *continued* during the life of the master agreement unless eliminated by mutual consent.

Thus, accepting, arguendo, Respondent’s distinction between, on the one hand, “local customs and practices” and, on the other hand, local customs or practices which provide additional specific *benefits*, we are met, in the instant case, with the Union’s master agreement providing a particular benefit called a “pension.” The Vineland unit employees, at all material times, have enjoyed not only a company *pension* but also a company retirement thrift plan (RTP) (G.C. Exh. 6). Article 4.3 of the master agreement, automatically applied here, would therefore appear to replace the Vineland employees’ conflicting pension plan with the pension plan specified in the master agreement. The master agreement, however, is silent on any benefit relating to an employee-employer funded investment or “Retirement Thrift Plan.” The Vineland employees’ RTP appears to me to be, if not a not-provided-for, nonconflicting local custom or practice within article 4.2, at least a “specified benefit” (as defined in art. 4.3), which “shall be continued for the term of this agreement unless eliminated by mutual agreement.” Thus, it is only the two opposing *pension* plans which, under section 4.2, are in conflict. The master agreement, as I read it, would replace the Vineland pension plan with the conflicting master agreement pension plan. Again, because the master agreement is silent on the existence of any *benefit* remotely resembling the retirement thrift plan, and because such a plan exists at the Vineland plant, it seems that, under the master agreement (art. 4.3), the thrift plan is a “specific benefit” which survives.

I therefore reject Respondent’s argument (R. Br. 54) that because the RTP is not specifically provided for in the master agreement, it does not survive. Respondent concentrates, in its brief (R. Br. 54), on the undoubted fact that article 4.2 does not refer to benefits. But, article 4.3 does refer to the survival of *benefits* which are in excess of the specific benefits provided for in the master agreement. Furthermore, I find that the master agreement is clear and unambiguous on this point. I reject the defense (R. Br. 53) that article 4 of the master agreement is an express *waiver* of the survival of the RTP. The only way that the RTP could be deemed as not having survived is to define it as something other than a non-covered, nonconflicting “benefit,” or to assume that the

<sup>15</sup> The parties agree, as above noted, that, by virtue of the master agreement (G.C. Exh. 3(a), sec. 2.1) Respondent’s canning plant employees who vote in the Union are automatically covered by the master agreement.

master agreement pension plan entirely exhausts the retirement position of employees in newly certified units. This, I refuse to do.

Respondent further argues that if, read together, sections 4.2 and 4.3 of article 4 are deemed ambiguous, then, under the bargaining history, past practice, and surrounding circumstances, the RTP would not be deemed a benefit which survived the automatic application of the Union's master agreement (R. Br. 54).

I have found, however, above, that the language of the master agreement is *not* ambiguous. Respondent, however, argues that if the surrounding circumstances, including bargaining history and prior positions of the parties are taken into account, then the conclusion follows that the Union impliedly *waived* any claim that the RTP survived the automatic application of the master agreement.

Respondent, were we to reach the prior practice and history of the parties, points to three recent occasions where the Union won elections where the Respondent's retirement thrift plan had been in effect, where the master agreement was then applied, and the RTP was immediately discontinued. Respondent asserts that on none of these occasions did the Union ("a sophisticated international union knowledgeable about protecting employees' rights," R. Br. 55) file either unfair labor practices or grievances protesting the loss of the RTP. Furthermore, Respondent notes that at one of the plants where the master agreement applied, the Union did file grievances regarding other matters but did not file grievances on Respondent's elimination of the RTP. Ultimately Respondent argues that the Union knew that it was the intent of the parties that newly unionized employees received what was specifically provided for in the master agreement, nothing more, nothing less (R. Br. 55).

The short of the matter, however, is that I do not know what the Union "knew" or why, in particular cases, it refrained from filing charges or grievances with regard to the loss of the retirement thrift plan at other plants under other bargaining circumstances. I do not know what financial, bargaining-strength, or other interest-guided union tactics. As Respondent notes, perhaps the Union thought that action at those times with regard to the loss of the RTP would have been futile, whether because of its own economic and bargaining condition or otherwise. Cf. *Boland Marine & Mfg. Co.*, 225 NLRB 824, 829-830 (1976).

Lastly, as above noted, Respondent appears to argue that because the master agreement contains a detailed *pension* plan, the entire subject of *retirement benefits* has been bargained out. Therefore, the omission of the retirement thrift plan should indicate that the omission in the master agreement was specific and intentional; and that it is no longer a subject appropriate for mandatory bargaining because it has already been bargained out. The answer to this argument, as above, is that the face of the master agreement shows that what has been bargained out is not the entire subject of "retirement benefits" but the specifics of the pension plan appearing in the master agreement. Indeed, the master agreement refers specifically to pensions (G.C. Exh. 3(a); art. 23) and to other wage-type benefits including a supplemental unemployment benefit plan (art. 24, G.C. Exh. 3(a)). There is no master agreement reference to "retirement benefits" or to an employee-employer supplemental retirement plan. Thus, I continue in my conclusion that, especially relating to em-

ployees in newly certified units, the subject of a "Retirement Thrift Plan," not appearing in the master agreement, is a noncovered, nonconflicting "benefit in excess of the specific benefits [i.e., the master agreement pension] provided for through the provisions of [the master agreement]" which continues under the provisions of article 4.3 of the master agreement.

I further conclude that the face of the master agreement's provisions in articles 4.2 and 4.3, above, are sufficiently clear that no recourse is needed, on a theory of ambiguity, to the parties' prior bargaining history and actions at other plants. Although the Supreme Court has reminded the Board that it is neither the sole nor the primary source of authority in the interpretation of collective-bargaining agreements, *Litton Business Systems v. NLRB*, 111 S. Ct. 2215, 2223 (1991), the Board, as the Court observes, nevertheless must continue to interpret collective-bargaining agreements in the context of alleged unfair labor practice adjudication, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). Within that limited framework, I conclude that the master agreement contains no express or implied waiver of the Union's right to demand bargaining on the termination of the existing benefit, the retirement thrift plan, and mandatory subject of bargaining.

I further conclude, therefore, that Respondent, in March and April 1990, unlawfully threatened the Vineland unit employees with loss of their RTP if they brought the Union in as their collective-bargaining representative, because the master agreement provided for such automatic loss. I conclude, on construction of the agreement, above, that application of the master agreement does not automatically provide for loss of the RTP; and that by threatening the employees with the loss of the RTP, it was making the "threat" without an objective basis on which the probable consequence of its loss would occur, a loss not beyond Respondent's control. I therefore conclude that Respondent threatened, as a consequence of unionization, an economic reprisal against its employees in violation of Section 8(a)(1) of the Act. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619.<sup>16</sup>

## 2. Unit and the Union's majority status

The complaint alleges and Respondent admits that, pursuant to Section 9(b) of the Act, the following employee unit is a unit appropriate for collective bargaining:

All full-time and regular part-time production and maintenance employees, employed by the Respondent at its 502 West Elmer Road, Vineland, New Jersey facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

Respondent denies that, commencing January 19, 1990, a majority of unit employees designated the Union as their collective-bargaining representative and denies that since on or

<sup>16</sup> Respondent has not argued that, in any event, its "threat" of loss of the RTP is not unlawful because, under *Gissel*, it had a good-faith belief, from the Union's failure to act in other eliminations of the RTP on application of the master agreement, that Vineland employees would lose the RTP. In the absence of Respondent having failed to make the argument, I shall refrain from doing so. In any case, Respondent did not tell its employees that they would probably lose the RTP; it said it was *automatic* (i.e., derived from the contract rather, than from the union's prior failures to act).

about February 9, 1990, pursuant to Section 9(a) of the Act, the Union has been the exclusive representative of the above unit employees for the purposes of collective bargaining.

The record shows no less than 18, "single purpose" union authorization cards in evidence (G.C. Exhs. 4(a)–4(r)), all dated prior to May 3, 1990. The parties further stipulated that at all material times up through the May 3, 1990 election, there were 31 employees employed in the unit. There appears to be no dispute, and I find, that since 18 of 31 employees signed "single purpose" union cards, a majority of the unit employees designated the Union as their collective-bargaining representative prior to the May 3, 1990 election. The parties further stipulate that the Union has not made a demand for recognition on Respondent.

As above noted, in the May 3, 1990 election, of the 31 eligible voters, 13 voted for the Union but 16 voted against.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about February 22, 1990, Respondent, by John Bugnitz, its supervisor and agent, violated Section 8(a)(1) of the Act by coercively interrogating an employee with regard to his and other employees' union activities.

4. On and after February 22, 1990 meetings with Respondent's unit employees, and in meetings in March and April 1990, Respondent violated Section 8(a)(1) of the Act, through its supervisor and agent John Bugnitz, by telling them that he was upset that the employees had gone behind his back in trying to get the Union in and had not come to him first to solve their problems; by telling them that he considered such action as a personal reflection on his managerial ability; and by threatening them with layoffs if they selected the Union as their collective-bargaining representative.

5. On or about April 5, 1990, and thereafter in April 1990, Respondent violated Section 8(a)(1) of the Act by threatening to discontinue its retirement thrift plan if the employees selected the Union as their collective-bargaining representative.

6. On or about April 17, 1990, in a letter to its employees, Respondent violated Section 8(a)(1) of the Act by threatening employees with layoffs and plant shutdown if they selected the Union as their collective-bargaining representative in the Board-conducted election on May 3, 1990.

7. On or about May 2, 1990, Respondent, through John Bugnitz, a supervisor and agent, violated Section 8(a)(1) of the Act, by telling an employee that if the plant became unionized, the employee would be responsible for the loss of a lot of jobs.

8. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, employed by the Respondent at its 502 West Elmer Road, Vineland, New Jersey facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

9. Since February 9, 1990, and at all material times thereafter, the Union has been, as is, by virtue of Section 9(a) of the Act, the exclusive representative of Respondent's employees in the unit, defined above here, for the purposes of collective bargaining.

10. Respondent, by committing the above unfair labor practices occurring in March, April, and May 1990, after the March 1, 1990 filing of the petition for certification, and before the May 3, 1990 Board-conducted election, engaged in objectionable conduct which interfered with employee free choice in, and affected the results of, the election.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and to take the following affirmative action which is designed to effectuate the policies of the Act.

The General Counsel, because of Respondent's serious unfair labor practices, in the presence of a card majority of unit employees, requests, and Respondent resists, a bargaining order as a remedy for the unfair labor practices, under the *Gissel* "category two" theory. See *Somerset Welding & Steel*, 304 NLRB 32 (1991); *BI-LO*, 303 NLRB 749 (1991), and *International Door*, 303 NLRB 582 fn. 2 (1991). Respondent notes that under current Board law, *Trading Port*, 219 NLRB 298 (1975), the General Counsel seeks retroactivity in the application of the master agreement,<sup>17</sup> i.e., the retirement thrift plan, and the other terms of the master agreement, back to February 1990 when Respondent set out on its course of serious unfair labor practices. Respondent urges that its conduct does not merit a bargaining order because of circumstances changing since the election, the unique circumstances of this case, and the absence of any lingering effect of Respondent's prior unlawful conduct.

The Union and the General Counsel, citing the progeny of *NLRB v. Gissel Packing Co.*,<sup>18</sup> 395 U.S. 575 (1969), urge that a bargaining order should issue, noting the types of 8(a)(1) misconduct (threats of layoff and plant closure; loss of RTP) and their effect on the election process. *Koons Ford of Annapolis*, 282 NLRB 506 (1986); *Long-Airdox Co.*, 277 NLRB 1157 (1985).

Respondent argues that the essential issue is not the commission of serious unfair labor practices but, under *Gissel*,

<sup>17</sup> Although automatic application occurs, under the terms of art. 2.1 of the master agreement (G.C. Exh. 3(a)), on certification or voluntary recognition, I believe that a Board order may also require automatic application where, as here, Respondent has interfered with and effectively eliminated the certification route.

<sup>18</sup> A recent gloss on the *Gissel* rule is found in *International Door*, 303 NLRB 582 fn. 2 (1991), where the Board said:

In *Gissel*, the Court identified two categories of cases in which a bargaining order would be appropriate. . . . The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court stated that in the latter situation a bargaining order should issue where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

whether there has been a showing that the unfair labor practices have destroyed the likelihood of a fair rerun election (actually, that the likelihood of a fair rerun election is “slight,” Member Oviatt, dissenting, *Somerset Welding*) so that a bargaining order is necessary to effectuate the policies of the Act (R. Br. 90). In support of Respondent’s argument that there be no bargaining order, it cites the fact that its economic concerns, which form the basis of the unlawful threats here, were mentioned to employees before the initiation of the organizing drive and were a serious economic problem regardless of whether Respondent stepped over the line and committed unfair labor practices in impressing on its employees the seriousness of these economic considerations. In addition, Respondent suggests there is no evidence of any lingering Respondent hostility toward the employees or the Union, and that the record shows no adverse action against any union supporter or a threat of reprisal against even the center of union activity, employee Carl Merkt.

Respondent further argues, conceding that threats of job loss and threats of lost benefits are generally the type of violations that might warrant a bargaining order (R. Br. 91), that these unfair labor practices do not have their genesis in union animus or hostility or toward the principle of unionization. With regard to the loss of the RTP, Respondent observes that its threat was not a “gutter level” threat (Br. 91). In support of that position, it cites its long history of contracts and bargaining with unions in general and with the Steelworkers Union, in particular. I have noted, however, *NLRB v. C.J.R. Transfer*, 936 F.2d 279 (6th Cir. 1991), enfg. 298 NLRB 579 (1990), that union animus is no less union animus simply because it springs from serious economic considerations). With Respondent having only 2 nonunionized plants out of a total of 32 plants I conclude that Respondent unlawfully demonstrated an extraordinary desire to keep the Union out of a plant with only 31 of its 3200 employees. Whether this derived from hatred of unions or from the desire to keep at least a couple of plants nonunion and to derive possible economic and flexibility benefits therefrom is a matter of legal indifference.

Respondent is quite correct in asserting that the type of violations in the instant case, in the presence of preexisting card majority, regardless of a bargaining demand, often merit the inclusion of a bargaining order as a remedy. See cases above cited in this remedy section.

Each case of “hallmark” threats before an election seems to raise the question of the imposition of a remedial bargaining order. The countervailing policy arguments, i.e., the preference of an election by secret ballot to resolve employee desires; the questionable use of “cards” as a reliable indicator of employee desires; whether a fair election could be held in light of the unfair labor practices, have recently been collected (in a case not altogether distinguishable) and *rejected* when measured against the particular threat, from high officials, of layoff or plant closing, *Somerset Welding & Steel*, 304 NLRB 32 (1991). This particular “hallmark” violation seems to catch the Board’s attention as “among the most flagrant.” *Somerset Welding*, supra. *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) (“the most pernicious”—such threats are “more likely to destroy election conditions for a longer period of time”). In the instant case, not only was Bugnitz the highest supervisor in the plant, but Respondent went out of its way to bring in corporate officials to threaten the em-

ployees with layoff and, in the April 17 letter to all employees, to imply plant closing as well. In particular, the General Counsel cites *Ed Chandler Ford*, 254 NLRB 851 (1981), where the board sustained a bargaining order noting that the threats emanated not from a minor supervisor but from Respondent’s sales manager. The sales manager told the employees that their support of the Union was incompatible with their continued employment, as in the instant case, where there were threats of layoff and plant closing. He further threatened them with loss of existing benefits if the Union got in.

Although the matter is not entirely free from doubt, I am guided by the facts and the Board’s conclusions in the recent decision in *BI-LO*, 303 NLRB 749 (1991). In that case, Administrative Law Judge Ries recommended the issuance of a bargaining order where, as here, the employer repeatedly emphasized the closing of its other plants on the advent of the union. In this regard I was particularly impressed, as above noted, with the effect on employees of Respondent’s widely distributed memorandum of April 17, 1990 (G.C. Exh. 8). Referring the employees to the Union’s record on job security, Respondent emphasized the fact that of 45 locations in 1970 where the Steelworkers Union was present with its master agreement, there were only 12 plants still open immediately prior to the May 3 election. As Respondent specifically reminded the employees in the Vineland unit, where other plants were intermediately opened and closed, “that’s 50 plant closings in total. Those locations that exist today have even been cut way back.” Judge Ries observed that the Third Circuit in *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987, noted that:

[a] closing of the plant is the ultimate threat for an employee, and its psychological effect is at least as likely not to dissipate as other unfair labor practices we have held to justify a *Gissel II* Order.

The Board, noting other violations, agreed that a bargaining order was appropriate but stated that it would not pass on the judge’s finding that a bargaining order would be justified merely on the threat of plant closure standing alone. *BI-LO*, supra at fn. 5. The Board, citing the court in *Midland-Ross*, emphasizes the effect of such disseminated threats from high officials, particularly where they originate with the advent of the Union. *Somerset Welding*, supra, fn. 6.

In the instant case, the threat of layoff and plant closure does not stand alone. As in *BI-LO*, supra, there are additional violations. Although I do not believe that the solitary instances of interrogation and Bugnitz’ single emotional threat of May 2 to Carl Merkt are supportive of a bargaining order, yet Respondent’s repeated additional threat of the employees’ losing their thrift retirement plan; its bringing in the supervisors from Rochelle Park to reinforce that conclusion in their slide show of April 5, 1990, it seems to me, is rather heavy medicine and would have a lasting effect on the employees’ recollections. It was not merely Plant Manager Bugnitz; it was the corporate-level managers.

In short, I believe that the slide shows and written distributions, along with the weekly employee meetings held after February 22 and up to the time of the election, stressing Bugnitz’ and corporate hostility to the Union, the treachery of the employees going behind Bugnitz’ back, the threat of

loss of benefits and the threats of layoff and plant closure militate in favor of the bargaining order as an appropriate remedy. In reaching this conclusion, I find that, under *Gissel*, a bargaining order based on a majority showing of authorization cards is a more reliable indication of employee choice because it seems likely that the employer's unfair labor practices have made the likelihood of a fair election slight, even with the imposition of the Board's traditional cease-and-desist order. A rerun election would not solve fairness problems created by Respondent's unfair labor practices. The employees presently enjoy the can handling system which on the record, in part, was the guarantor of their job security. The end press transfer, the other part of their job security, is either still on hold or is frozen (Tr. 758-762). The Union's position is pretty well undermined. In a rerun election, the employees might reasonably ask themselves: Who needs the Union now?

To the extent that Respondent argues that changed circumstances weigh against a bargaining order (line 1 will not be removed, therefore the threat of job loss has subsided; transfer of Toomey; Krueser and Bireley are gone, etc.) are singularly unimpressive. Bugnitz remains. The employees have their can handling system, a promised element of job security. The end press installation is conditioned on attrition at the Baltimore plant (i.e., within Respondent's discretion).

The argument that a bargaining order will merge the Vineland employees into a multiplant unit of 1200 employees which will nullify their decertification rights is sophistry. In the first place, each time that Respondent, under the master agreement, voluntarily recognizes a unit in the metal industry, it merges the smaller unit into the overall unit—even without an election. Second, Respondent's solicitude for employee election rights after seriously interfering in the election process cannot obscure the crocodile tears.

The matter does not end there. The parties have agreed that a bargaining order brings with it the application of the master agreement at the Vineland unit. I agree. But the date of retroactivity remains outstanding. Respondent's argument that *Trading Port*, 219 NLRB 298 (1975), retroactivity will impose a serious economic hardship is also not a convincing position: it is the product of its own unfair labor practices.

I do observe, however, that in the particular facts of this case, and guided by *Trading Port* (where retroactivity was invoked to the later date of the Union's recognition demand, not the prior date of the employer's embarking on its course of unfair labor practices), that there was no preelection union recognition demand even in the presence of a card majority. Rather, the Union, despite its filing of unfair labor practice charges, pursued the election process in the hope of securing certification. Here, had the Union been successful in an untainted election process, a supportable bargaining request no earlier than the date of the election (May 3, 1990) could have been perfected.

In short, absent a union request for recognition, as here, and the Union's dependence in the first instance on the results of the election on which to base majority status and an ensuing bargaining request, it would be a clear windfall to the Union and the unit employees to gain substantial contract benefits retroactive to Respondent's February 22 unfair labor practices. The Union, had it been successful in the election, under the terms of the master agreement (art. 2, sec. 2.1, G.C. Exh. 3(a)), could expect inclusion of the unit no earlier

than May 3. To order Respondent's bargaining obligation (and the application of the terms of the master agreement) retroactive to the date of the May 3 election is: (a) consistent with the agreement of the parties in the master agreement; (b) consistent with the expectations of the parties had there been no seriously unlawful interference with the Board's election process; (c) designed to avoid a "windfall" to the unit employees which would occur if the retroactivity was ordered back to the start of Respondent's February 22 unfair labor practices, a time at which, absent an intermediate bargaining request, there was no union desire or expectation of then receiving master agreement benefits; and (d) to avoid the appearance of punitive elements in the remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

#### ORDER

The Respondent, Crown Cork & Seal Company, Inc., Vineland, New Jersey, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Coercively interrogating its employees, threatening its employees with loss of benefits, threatening its employees with layoffs or plant shutdown, and telling employees that if the Union got in, they, or any of them, would be responsible for loss of jobs, because of their support for or membership in United Steelworkers of America, AFL-CIO-CLC.

(b) In any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union, as the exclusive representative of the employees in the appropriate unit set forth above, by applying the terms of the master agreement, and any applicable amendment or successor thereto, to the Vineland unit employees (defined here in Conclusion of Law 8) and the Union retroactive to May 3, 1990, and thereafter, continue to recognize and bargain with the Union with respect to rates of pay, hours, and other terms and conditions of employment.

(b) Make whole Vineland unit employees for the period commencing May 3, 1990, for any loss of earnings and benefits they may have sustained by virtue of Respondent's failure to apply the terms of the master agreement to them, and make whole the Union for any master agreement contributions Respondent failed to make to it commencing May 3, 1990.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

<sup>19</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its factory in Vineland, New Jersey, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized rep-

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<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

resentative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Union's objections to the election in Case 4-RC-17299 are sustained, the election of May 3, 1990, is set aside, and the petition there is dismissed.